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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 29.

THE PROPELLER "J. P. DONALDSON," ROBERT HOLLAND, CLAIMANT, APPELLANT,

vs.

THE BARGE "ELDORADO," WELTHA A. SLYFIELD, OWNER, AND THE BARGE GEORGE W. WESLEY, CHARLES SONSSMITH ET AL., OWNERS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED DECEMBER 12, 1892.

(15,231.)

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SUPREME COURT OF THE UNITED STATES.

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No. 202.

THE PROPELLER "J. P. DONALDSON," ROBERT HOLLAND, CLAIMANT, APPELLANT,

vs.

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a United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "J. P. DONALDSON;" ROBERT HOLLAND, Claimant and Appellant,
vs.
THE BARGE "ELDORADO," WELTHA A. SLYFIELD, Owner, and the Barge "George W. Wesley," Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, Owners.

These causes, having been heretofore consolidated, come before this court on an appeal from the decree of the circuit court of the United States for the eastern district of Michigan, in admiralty, reversing the decree of the district court in said causes and holding, on the facts found in said decree and in the opinions of the said district court and the said circuit court, that the libellants and appellees are entitled to recover from the said propeller "J. P. Donaldson" for the loss of said barges as a general average contribution, which facts are substantially as follows:

The "J. P. Donaldson" was towing the said barges "Eldorado" and "Geo. W. Wesley" from Buffalo, New York, to Bay City, Michigan, having no other connection with them than that she was to tow them and to receive for her services a portion of freight which the said barges would earn on the trip according to the custom and usage which prevails upon the Great Lakes. By
b a violent storm and without negligence on the part of the "J. P. Donaldson" she, with her tow, were driven on a lee shore, and all were in imminent, if not certain, peril of being blown ashore and lost. The "Donaldson" struggled against the storm to the last moment she could with safety to herself, and then, in order to prevent her from going ashore and being lost, her master, after first giving notice with her steam whistle of his intention to do so and without negligence on his part, cut the tow-line connecting said barges to her, and the said barges were driven on shore and were wrecked and lost, and the "Donaldson," by reason of being thus disincumbered of her tow, was enabled to reach a port of safety.

The question arising in said causes as to the right of the owners of said barges to recover for their loss against the said propellor "J. P. Donaldson" upon the principles of general average, and whether the law of general-average contribution is applicable in such cases, being one in respect to which this court desires the instruction of the Supreme Court, it is therefore—

Ordered that the question as to the right of said owners and appellees to recover for a general-average contribution be, and the same is hereby, certified to the Supreme Court of the United States, and the instruction of the Supreme Court on said question is respectfully requested; and it is further ordered that a copy hereof and also a copy of the pleadings and of the decrees and the opinions

of the said district and the said circuit courts be transmitted *c* to the clerk of the Supreme Court of the United States, duly certified by the clerk of this court, under the seal thereof.

October 13th, 1892.

HOWELL E. JACKSON.
WM. H. TAFT.
E. S. HAMMOND.

d [Endorsed:] No. 19. U. S. circuit court of appeals. Weltha A. Slyfield, &c., *et al. vs.* The Propeller "J. P. Donaldson." Order certifying to the Supreme Court. Filed Oct. 13, 1892. Walter S. Harsha, clerk. A, 76. F. H. Canfield, for appellees.

e UNITED STATES OF AMERICA:

United States Circuit Court of Appeals for the Sixth Circuit.

CHARLES SONSSMITH, LUCIUS P. MASON, JOHN S. ESTABROOK, and Henry Estabrook, Owners of the Barge "George W. Wesley," and Weltha A. Slyfield, Owner of the Barge "Eldorado," Libellants and Appellants,

vs.

THE TUG "J. P. DONALDSON," HER ENGINES, ETC.; ROBERT HOLLAND and HOWARD F. TOWLE, Claimants and Appellees.

On appeal from the circuit court of the United States for the eastern district of Michigan. In Admiralty.

1 Pleas of the district court of the United States for the eastern district of Michigan, begun and held at the district court-room, in the city of Detroit, in the eastern district of Michigan.

Be it remembered that on the twenty-first day of December, in the year of our Lord one thousand eight hundred and eighty, being one of the days of said term, Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, by Moore, Canfield and Warner, his proctors, came into the said court and filed a libel against the steam propeller "J. P. Donaldson," her engines, machinery, boats, tackle, apparel, and furniture; which said libel was in the words and figures following, to wit:

In Admiralty.

To the Honorable Henry B. Brown, judge of the U. S. district court for the eastern district of Michigan:

The libel of Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, of the county of Saginaw, in the State of Michigan, against The Steam Propeller "J. P. Donaldson," whereof Howard F. Towle is or lately was master, her engines, boats, tackel, apparel, and furniture, and against all persons lawfully intervening for their interest therein, in a cause of negligent

towage and breach of contract, civil and maritime; and thereupon the said libellants do allege and propound as follows:

First. That your libellants at the time when the cause of action hereinafter stated arose and now are the owners of the schooner barge "Geo. W. Wesley," which said schooner, as well as the aforesaid propeller, were vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade and employed in the business of commerce and navigation between ports and places
2 in different States and Territories upon the lakes and navigable waters connecting said lakes within the true meaning and intent of the act of Congress.

Second. That on the nineteenth day of November, A. D. 1880, the said schooner barge, being then and also at the time of the loss and damage hereinafter mentioned tight, strong, staunch, and in every respect well manned, tackled, appareled, and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts and upon the lookout for the protection and safety of said vessel, was bound on a voyage from the port of Buffalo, in the State of New York, to the port of Saginaw, in the State of Michigan.

Third. That at about eight o'clock in the evening of the said day the said schooner left the port of Buffalo, together with the barges Eldorado and Bay City, in tow of the said propeller J. P. Donaldson; that the Bay City was first in the tow, the schooner Wesley second, and the Eldorado was third; that they were bound for Detroit river and Saginaw; that when they left the wind was to the southeast; that the said propeller with her said tow proceeded up the lake, but instead of taking the usual and proper course up the lake she kept over to the southerly side of the lake; that she passed Dunkirk at about one o'clock on the morning of the 20th; that during the night the wind shifted around more to the southerly and westerly; that said schooner during the night and until about three o'clock in the morning carried her mainsail, foresail, and staysail, and that at about three o'clock said sails were taken in, as the wind was getting around into the southwest, and so the sails would not draw on the course that they were then running; that during the
3 day of the 20th the propeller and tow proceeded — at about six o'clock on the evening of the 20th they were in sight, though some ten miles distant from the lights at Erie; that about nine o'clock, when some four or five miles below Erie, the wind being about southwest and fresh, with a heavy sea setting down along the shore, the signal of the propeller was sounded to the vessels in the tow to get their anchors ready; that soon thereafter the line of the Bay City was cut or cast off from the propeller, the anchors of the said schooner Wesley were at once thrown, and all effort made to come to anchor, but she was in so near the shore that although both anchors were thrown and chain paid out as rapidly as could be done the said schooner drifted, dragging her anchors for nearly half a mile, and fetched upon the rocks close into the shore, where the said schooner now lies a wreck.

Fourth. That the crew of said schooner were compelled to leave

her that night, but returned the next day, found her stern posts and rudder gone, and that she was very badly twisted; that they proceeded to strip her and save from her what could be saved.

Fifth. That the said propeller J. P. Donaldson after casting off the line of the Bay City abandoned her tow and went into the port of Erie, and neither her master or crew made any effort whatever to save the said schooner or any of her said tow or gave any notice whatever of the perilous condition of her said tow, and the other vessels of her tow went ashore and now lie upon the rocks in the immediate vicinity of the said schooner Wesley.

Sixth. That the master of the said propeller undertook and agreed to tow the said schooner Wesley with all proper care and
4 skill to the said port of Saginaw for one-third of the freight for the round trip from Saginaw to Buffalo and return, which was about the sum of three hundred and forty-four dollars, which said sum libellants undertook and agreed and were willing to pay on the proper performance of the contract, and libellants allege that under the circumstances it became and was the duty of the owner, master, and crew of said propeller to equip, officer, man, and navigate the said propeller with all care and skill and in a proper manner for the performance of the said contract.

Seventh. That libellants allege that the propeller J. P. Donaldson, her master and owner, were in fault in this:

(*a.*) That the said propeller at the time of the said breach, loss, and damage was not in good condition.

(*b.*) That she was not properly officered, manned, and equipped.

(*c.*) That she was navigated out of the proper course for vessels upon the route in question.

(*d.*) That she abandoned her tow and left it when it was her duty to have remained by it.

(*e.*) That she gave no sufficient notice of her intention to desert and abandon her tow, nor was proper effort made to induce others to aid said tow.

Eighth. That libellants suffered damages by the negligence and misconduct of the master and crew of the said propeller and her owner by the loss of said schooner, amounting in all to the sum of eight thousand dollars, for which your libellants claim to have a lien upon said vessel enforceable in this honorable court.

Ninth. That the aforesaid loss and damage was occasioned solely by the negligence, unskillfulness, and carelessness of the per-
5 sons navigating the said propeller J. P. Donaldson and not by or through any fault, negligence, or improper conduct on the part of your libellants, said vessel, her master or crew.

Tenth. That since the aforesaid loss and damage your libellants have applied in a friendly manner to the owner of the said propeller J. P. Donaldson and requested him to settle for the damages sustained by your libellants as above mentioned, but the said owner has refused to pay the said loss and damage as aforesaid or any part thereof.

Eleventh. That all and singular the premises are true, and that

the said propeller J. P. Donaldson is now lying at the port of Marine City, in the district aforesaid.

Wherefore your libellants pray that process in due form of law, according to the course and practice of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said steam propeller J. P. Donaldson, her engines, boats, tackle, apparel, and furniture, and that all persons having an interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court will be pleased to decree payment of the damages aforesaid with costs, and that the said vessel may be condemned and sold to pay the same, and that your libellants may have such other and further relief as in law and justice they are entitled to receive.

CHARLES SONSSMITH.
LUCIUS P. MASON.
JOHN S. ESTABROOK.
HENRY ESTABROOK,
By L. P. MASON.

MOORE, CANFIELD & WARNER,
Libellants' Proctors.

EASTERN DISTRICT OF MICHIGAN, } *ss:*
Wayne County, }

Be it remembered that on this seventeenth day of December, A. D. 1880, before me, at Detroit, in *in* said district, personally appeared the within-named Charles Sonssmith, Lucius P. Mason, and John S. Estabrook, three of the within-named libellants, and made solemn oath that they had heard read the foregoing libel and know the contents thereof, and that the same is true as to their own knowledge except as to those matters and things stated to be on their information and belief, and as to these matters and things they believe it to be true.

6

THO. BOWRING,
Notary Public, Wayne County, Michigan.

Afterwards, on the twenty-first day of December, A. D. 1880, an attachment was issued on said libel and was, on the 31st day of January, A. D. 1881, returned by the marshal of said district, with his doings thereon endorsed; which attachment and return were in the figures following, to wit:

District Court of the United States for the Eastern District of Michigan, *ss:*

The President of the United States of America to the marshal of the eastern district of Michigan, Greeting:

Whereas a libel hath been filed in the said district court of the United States for the eastern district of Michigan on the 21st day of December, in the year of our Lord one thousand eight hundred and

eighty, by Charles Sonssmith, Lucius P. Mason, John S. Estabrook,
and Henry Estabrook against the steam propeller "J. P.
7 Donaldson," her engines, machinery, boats, tackle, apparel,
and furniture, claiming for damages for the negligent and careless towing by said propeller of their schooner barge Geo. W. Wesley on or about November 19th, 1880, from the port of Buffalo, New York, to the port of Saginaw, in the State of Michigan, the sum of eight thousand dollars ($8,000.00), for the reasons and causes in the said libel alleged and mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said propeller or vessel, her tackle, etc., may be cited in general and special to answer the premises, and that all proceedings being had that the said propeller or vessel, her tackle, etc., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore hereby commanded to attach the said propeller J. P. Donaldson, or vessel, her boats, tackle, etc., and to detain the same in your custody until the further order of the said court respecting the same, and to give due notice to all persons claiming the same or knowing or having anything to say why the same should not be condemned and sold, pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the said eastern district of Michigan, on the first Tuesday of February next, at ten o'clock of the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf; and what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the Honorable Henry B. Brown, judge of the dis-
8 trict court of the United States for the eastern district of
Michigan, at the district court-room, in the city of Detroit, in the said district, this 21st day of December, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States of America the one hundred and fourth.

D. J. DAVISON, *Clerk.*

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that by virtue of the within writ I did on the 3rd day of January, A. D. 1881, seize the within-named steam propeller J. P. Donaldson, her engines, boats, tackel, and apparel and furniture, and now have the same in my custody to await the further order of the court in the premises.

S. S. MATTHEWS, *Marshal,*
By C. C. PENNEY,
Deputy U. S. Marshal, Custodian.

That afterwards, on the 21st day of December *21st*, A. D. 1880, Walter A. Slyfield, by Moore, Canfield and Warner, his proctors, came into said court and filed an intervening libel against said pro-

peller J. P. Donaldson; which said libel was in the words and figures following, to wit:

In Admiralty.

To the Hon. Henry B. Brown, judge of the U. S. district court for the eastern district of Michigan:

The libel of Weltha A. Slyfield, of the county of St. Clair, in the State of Michigan, against the steam propeller J. P. Donaldson, whereof Howard F. Towle is or lately was master, her engines, boats, tackle, apparel, and furniture, and against all persons
9 lawfully intervening for their interest therein, in a cause of negligent towage and breach of contract, civil and maritime; and thereupon the said libellant doth allege and propound as follows:

First. That your libellant, at the time when the cause of action hereinafter stated arose, was and now is the owner of the barge Eldorado, which said barge as well as the aforesaid propeller J. P. Donaldson were vessels of twenty tons burden and upwards enrolled and licensed for the coasting trade and employed in the business of commerce and navigation between the ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes, within the true meaning and intent of the act of Congress.

Second. That on the nineteenth day of November, A. D. 1880, the said barge Eldorado, being then and also at the time of the loss and damage hereinafter mentioned tight, staunch, strong, and in every respect well manned, tackled, apparelled, and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts and upon the lookout for the protection and safety of said vessel, was bound on a voyage from the port of Buffalo, in the State of New York, to the port of Saginaw, in the State of Michigan.

Third. That at about eight o'clock in the evening of said day the barge Eldorado, together with the barges Bay City and Geo. W. Wesley, were taken in tow by the said propeller J. P. Donaldson, under and agreement with the master of said propeller to *two* the said barge to the port of St. Clair for one-eighth, or to the port of Saginaw for one-sixth, of the freight of said barge for the round trip from Saginaw to Buffalo and return.

10 Fourth. That under said agreement the said propeller J. P. Donaldson, at about eight o'clock of the evening of the 19th aforesaid, left the port of Buffalo with the barge Bay City, schooner Geo. W. Wesley, and the said Eldorado in tow in the order named; that she proceeded on up the lake, but instead of keeping upon a proper course up past Long point for Point Au Pelee she ran out of her course and kept near the southerly shore of the lake, hugging the shore, which shore is rocky and dangerous to follow closely; that on the evening of the twentieth, at about nine o'clock p. m., and when some four or five miles below the port of Erie, the wind being then to the southwest and a heavy sea setting down the

lake, the propeller sounded her whistle, signalling the said tow to let go their anchors; that said propeller soon thereafter cut or cast off the line of the vessel next astern, to wit, the Bay City; that the said barge Eldorado at once got her anchor ready to throw, but as the Bay City and Wesley *was* settling back upon her her master delayed a little to throw his anchor, but before the Bay City and the Wesley stopped drifting down upon her she commenced pounding and in a very few minutes fetched upon the rocks on shore or close to shore, where she now lies a wreck.

Fifth. That the master and crew on said barge were compelled to leave her that night for safety, which they did, and returned to her the next day; the wind blowing very hard during the night, found her badly broken and damaged, an-, as libellant believes, of little or no value.

Sixth. That the master and crew proceeded to strip the said wreck and save from it all that could be saved of her sails, rigging, etc.

Seventh. That by said agreement between the master of said barge and said propeller it became and was the duty of
11 said propeller, her officers and crew, to equip, officer, man, and navigate the said propeller with all care and skill and in a proper manner for the performance of the said contract, but instead of doing so the said propeller abandoned her said tow and went into Erie and made no effort whatever to save the said barge or give any notice of her perilous condition, but left her to her fate.

Eighth. That libellants alleges that said propeller, her master and owner, were in fault, in this:

(*a.*) That said propeller was not in good condition, officered, manned, and equipped for the performance of the contract.

(*b.*) That she was navigated out of her proper course for vessels upon the voyage in question.

(*c.*) That said propeller abandoned and deserted her tow, when it was her duty to have remained by it and cared for it.

(*d.*) That no sufficient notice of an intention to desert and abandon was given, nor were efforts made to take the said tow to a place of safety, and no effort was made either to return to the said tow or to induce others to aid said tow.

Ninth. That libellants suffered damages by the negligence and misconduct of the master and crew of said propeller and in the loss of said barge and the furniture thereof in a large sum, amounting in all to the sum of nine thousand dollars, for which your libellant claims to have a lien upon said vessel enforceable in this honorable court.

Tenth. That the aforesaid loss and damage was occasioned solely by the negligence, unskillfulness, and carelessness of the per-
12 sons navigating the said propeller J. P. Donaldson and not by or through any fault, negligence, or improper conduct on the part of your libellant's said vessel, her master or crew.

Eleventh. That since the aforesaid loss and damage your libellant has applied in a friendly manner to the owners of said propeller J. P. Donaldson and requested them to settle for the damages sustained by your libellant as above mentioned, but the said owner

has refused to pay the said loss and damage as aforesaid or any part thereof.

Twelfth. That all and singular the premises are true, and that the said propeller is now lying at the port of Marine City, in the district aforesaid.

Wherefore your libellant prays that process in due form of law, according to the course and practice of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said steam propeller J. P. Donaldson, her engines, boats, tackle, apparel, and furniture, and that all persons having any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court will be pleased to decree the payment of the damages aforesaid, with costs, and that the said vessel may be condemned and sold to pay the same, and that your libellant may have such other and further relief as in law and justice she is entitled to receive.

WELTHA A. SLYFIELD,
By L. L. SLYFIELD,
Agent and Master.

MOORE, CANFIELD & WARNER,
Libellant's Proctors.

STATE AND EASTERN DISTRICT OF MICHIGAN, } *ss:*
Wayne County, }

Be it remembered that on this seventeenth day of December, A. D. 1880, before me, at the city of Detroit, in said district,
13 personally appeared Luther L. Slyfield, agent of the within-named libellant, Weltha A. Slyfield, and master of said barge Eldorado, within named, and made solemn oath that he had heard read the foregoing libel and knows the contents thereof, and that the same is true as to his own knowledge except as to those matters and things stated to be on information and belief, and as to these matters stated to be on information and belief, and as to these matters and things he believes — to be true.

ROBERT M. CHAMBERLAIN,
Notary Public, Wayne County, Michigan.

That afterwards, on the first day of February, A. D. 1881, Robert Holland and Howard F. Towle, as claimants of the said prop. J. P. Donaldson, with Leonard B. Parker and William B. Morley as sureties, filed in said court a stipulation to answer judgment in said cause; which stipulation was in the words and figures following, to wit:

District Court of the United States for the Eastern District of Michigan, *ss:* In Admiralty.

On this twenty-seventh day of January, in the year of our Lord one thousand eight hundred and eighty-one, before Mr. William Grace, a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits, and depositions, etc., within the eastern district of Michigan, in the matter of the libel and claim of

Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and
14 Henry Estabrook against the steam barge J. P. Donaldson, her engines, tackle, apparel, and furniture, in a cause of admiralty, civil and maritime, moved and prosecuted in the district court of the United States for the district aforesaid.

Which day personally appeared Robert Holland and Howard Towle, as claimants of the said steam barge J. P. Donaldson, and produced for sureties L. B. Parker and W. B. Morley, of Marine City, St. Clair county, in said district; and the said Robert Holland, Howard Towle, L. B. Parker, and W. B. Morley, submitting themselves to the jurisdiction of the court, bound themselves, their heirs, executors, and administrators, in the sum of sixteen thousand dollars into the said Chas. Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, that the said Holland and Towle shall abide and answer the decree of the said court in the aforesaid cause, and unless they shall do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, lands and tenements, wherever the same may be found, to the value of the sum above mentioned.

Taken and acknowledged this 27th day of January, A. D. 1881, before me, Wm. Grace, U. S. commissioner, 6th circuit and eastern district of Michigan.

ROBERT HOLLAND.
HOWARD F. TOWLE.
L. B. PARKER.
W. B. MORLEY.

EASTERN DISTRICT OF MICHIGAN, *ss*:

For the purposes of the suit referred to in the above bond it is now stipulated and agreed by and between us, as parties thereto, that the cash value of the said steam barge above referred to is the sum of fifty thousand dollars.

Dated St. Clair, Jan'y 27th, 1881.

ROBERT HOLLAND.
HOWARD F. TOWLE.

15 EASTERN DISTRICT OF MICHIGAN, *ss*:

Appeared personally Robert Holland, Howard F. Towle, Leonard B. Parker, and Wm. B. Morley and made oath that they are worth the sum of sixteen thousand dollars and upwards, of lawful money of the United States of America, after payment of all just debts, in real estate subject to execution within the eastern district of Michigan—that is to say, the said Robert Holland in the sum of five thousand, and the said Howard Towle in the sum of one thousand dollars, and the said Leonard B. Parker in the sum of ten thousand dollars, and the said William B. Morley in the sum of fifteen hundred dollars.

ROBERT HOLLAND.
HOWARD S. TOWLE.
L. B. PARKER.
W. B. MORLEY.

On the 27th day of January, A. D. 1881, the said Holland, Towle, Parker, and Morley were sworn to the truth of the above attestation before me—

WM. GRACE,
U. S. Commissioner, 6th Circuit and Eastern District of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I do hereby approve of the within bond and of the sureties therein named as sufficient.

Given under my hand at St. Clair, in said district, this 27th day of January, 1881.

WM. GRACE,
U. S. Commissioner.

16 Afterwards, at a session of the district court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, in said district, on Tuesday, the first day of February, in the year of our Lord one thousand eight hundred and eighty-one, on application of Maynard and Swan, on behalf of said claimants, twenty days were granted to answer said libels.

Afterwards, at a session of the district court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, in said district, on Monday, the seventh day of February, in the year of our Lord one thousand eight hundred and eighty-one, an order was made and entered in said cause in the words and figures following, to wit:

CHARLES SONSSMITH, LUCIUS P. MASON, JOHN ESTABROOK, and HENRY ESTABROOK
vs.
THE PROP. J. P. DONALDSON, HER ENGINES, &C.
} On a Libel for Negligent Towing. In Admiralty.

On application of Maynard and Swan, it is ordered that libellants file security for costs herein, as required by the rules and practice of the court.

WELTHA A. SLYFIELD
vs.
THE PROP. J. P. DONALDSON.
} On Int'g Libel for Towing. In Admiralty.

17 On application of Maynard and Swan, it is ordered that the libellant file security for costs herein, as required by the rules and practice of the court.

That afterwards, on the 12th day of February, A. D. 1881, a stipulation to answer judgment was filed in said cause in the words and figures following, to wit:

District Court of the United States for the Eastern District of Michigan, *ss:* In Admiralty.

On this tenth day of February, in the year of our Lord one thousand eight hundred and eighty-one, before me, Wm. Grace, a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits, and depositions, etc., within the eastern district of Michigan, in the matter of the libel and claim of Weltha A. Slyfield against the steam propeller "J. P. Donaldson," her engines, boilers, boats, tackle, apparel, and furniture, in a cause of negligent towage and breach of contract, civil and maritime, moved and prosecuted in the district court of the United States for the district aforesaid.

Which day personally appeared Robert Holland and Howard F. Towle as claimants of the said steam propeller "J. P. Donaldson," her engines, boilers, boats, tackle, apparel, and furniture, and produced for sureties P. H. Clark, Joseph Babel, and J. S. McNeal, of Marine City, St. Clair county, in said district, and the said Robert Holland, Howard Towle, P. H. Clark, Joseph Babel, and J. S. McNeal, submitting themselves to the jurisdiction of the court, bound themselves, their heirs, executors, and administrators, in the sum of eighteen thousand (18,000) dollars, unto the said Weltha A. Slyfield that the said Holland and Towle shall abide and answer the decree of the said court in the aforesaid cause; and, unless they shall so do, they do hereby, severally, consent that execution
18 shall issue forth against them, their heirs, executors, and administrators, goods and chattels, lands and tenements, wherever the same may be found, to the value of the sum above mentioned.

ROBERT HOLLAND.
HOWARD TOWLE.
P. H. CLARK.
JOSEPH BABEL.
J. S. McNEILL.

Taken and acknowledged this 10th day of February, A. D. 1881, before me—

WM. GRACE,
U. S. Commissioner, 6th Circuit and Eastern District of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Appeared personally Robert Holland, Howard Towle, P. H. Clark, Joseph Babel, and J. S. McNeal, and made oath that they — worth the sum of eighteen thousand dollars of lawful money of the United States of America, after payment of just debts, in real estate, subject to execution, within the eastern district of Michigan—that is to say, the said Robert Holland in the sum of eight thousand, Howard Towle in the sum of one thousand dollars, P. H. Clark in the sum of three thousand dollars, Joseph Babel in the sum of four

thousand dollars, and the said J. S. McNeal in the sum of two thousand dollars.

ROBERT HOLLAND.
HOWARD TOWLE.
P. H. CLARK.
JOSEPH BABEL.
J. S. McNEILL.

On the 10th day of Feb., A. D. 1881, the said above-named bondsmen were sworn to the truth of the above attestation before me—

WM. GRACE,
U. S. Commissioner, 6th Circuit and Eastern District of Michigan.

19 Afterwards, on the 24th day of February, A. D. 1881, the said libellant, Weltha A. Slyfield, came into said court and filed a stipulation for costs in the words and figures following, to wit:

District Court of the U. S., Eastern District of Michigan.

WELTHA A. SLYFIELD, Libellant,
vs.
THE PROP. "J. P. DONALDSON."

We, the undersigned, do hereby agree to be and become liable for all costs to the amount of two hundred and fifty dollars, which may be adjudged against said libellant in the above-entitled cause, and we do hereby acknowledge ourselves liable to pay the same in accordance with the rules and practice of said court.

L. L. SLYFIELD.
G. STRAWSS.
JOHN W. GERMAN.

Detroit, February 10th, 1881.

Afterwards, on the 28th day of February, A. D. 1881, Robert Holland and Howard F. Towle, by Maynard and Swan, their proctors, came into the said court and filed their claim and answer to the libel of Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook in the words and figures following, to wit:

District Court of the United States for the Eastern District of Michigan. In Admiralty.

20 CHARLES SONSSMITH, LUCIUS P. MASON, JOHN S. ESTABROOK, and HENRY ESTABROOK
vs.
THE PROP. J. P. DONALDSON, HER ENGINES, &C.

The claim and answer of Robert Holland and Howard F. Towle, claimants and respondents, to the libel of Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, the above-named libellants.

To the Honorable Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan:

And now comes the said Robert Holland — Howard F. Towle and claim the said propeller J. P. Donaldson, her engines, boilers, boats, tackle, apparel, and furniture, and state that they, the said Holland and Towle, are the sole, true, and *bona fide* owners of the said propeller J. P. Donaldson, her engines, boilers, boats, tackle, apparel, and furniture, and that no other person is the owner thereof.

And these respondents, for answer to said libel, allege and aver as follows:

First. These respondents admit so much of the first article of said libel as alleges the burden and employment of the said propeller J. P. Donaldson and the schooner barge Geo. W. Wesley therein mentioned, but have no knowledge, save as informed by said libel, of the ownership of barge Geo. W. Wesley, and leave libellants to their proof thereof.

Second. Respondents, answering the second article of said libel, admit that on the 19th day of November, A. D. 1880, said schooner barge Geo. W. Wesley was bound on a voyage from Buffalo, in the State of New York, to the port of Saginaw, in the State of
21 Michigan, but on information and belief deny the remaining allegations and averments in said second article contained.

Third. Respondents admit that about 8 o'clock in the evening of November 19th, 1880, said propeller J. P. Donaldson left Buffalo having in tow the said Bay City, said barge Geo. W. Wesley, and the barge Eldorado in the order named, and that said propeller and barges were bound for the Detroit river and Saginaw; that at the time of leaving Buffalo the wind was southeast, and that said propeller with her tow proceeded up the lake, on the southerly side of Lake Erie. They admit that during the night of November 19th the wind shifted somewhat more to the southward and westward. They admit that said propeller and barges proceeded on their course during the 20th of November, 1880, and at about 8 o'clock in the evening of said November 20th said propeller and tow were distant from Erie about 6 to ten miles, but respondents deny that said propeller in keeping on the southerly side of Lake Erie, under the circumstances and the condition of the wind and weather existing during said voyage and set forth in said libel, departed from or did not pursue the usual and proper course. Respondents also admit

that about the hour in said third article stated the whistle of said propeller was sounded as a signal to said barges in tow to get their anchors ready, and aver further that said signal was also given to and understood by those on board said barges as a signal to make *make* sail, but respondents deny that when said signal was given the wind was southwest, but they admit that the sea was heavy. They also admit that the line to the Bay City was cut on said propeller after the giving of the signal aforesaid, but they deny that the facts relative to the force and direction of the wind and the state of the weather and the circumstances under which said
22 line was cut and said barge went ashore are correctly stated in said libel, and aver that the facts relative to the wind and weather, the cutting of said line, and the stranding of said barge Geo. W. Wesley are as hereinafter in this their answer stated and not otherwise, and respondents on information and belief deny the remaining allegations and averments in said third article of said libel contained.

Fourth. Respondents have no knowledge of the matters alleged and averred in the fourth article of said libel, but leave libellants to make such proofs as they may be advised.

Fifth. Respondents deny the allegations and averments in the fifth article of said libel contained as the same are therein stated.

Sixth. Respondents deny the truth of the allegations and averments in the sixth article of said libel contained as therein stated.

Seventh. Respondents deny each and every specification of fault charged against said propeller J. P. Donaldson in the seventh article of said libel contained, and deny that said propeller, her owners or master, were guilty of any fault or negligence whatever in the performance of the towage service in said libel referred to.

Eighth. Respondents deny the truth of the matters set forth in the eighth article of said libel; deny that the master and crew of said propeller J. P. Donaldson were guilty of any misconduct or negligence as therein charged, and deny that libellants have suffered damages to the amount in said article claimed or to any amount whatever by reason of any act or omission of the master or crew of said propeller.

Ninth. Respondents deny the allegations and averments in the ninth, tenth, and eleventh articles of said libel contained.

23 Tenth. Respondents, further answering said libel, aver that on or about November 19th, 1880, at Buffalo, in the State of New York, application was made to Howard F. Towle, master of said propeller J. P. Donaldson, by the masters of the said barge Eldorado and said barge Geo. W. Wesley, to tow said barges to Saginaw, it being understood that the barge Bay City would also go in the same tow; that said Towle, owing to the lateness of the season and the then perils of navigation, declined to undertake absolutely to tow said barges to any particular port, but agreed to take said tow as far on their voyage as the conditions of navigation would permit, to which said masters assented.

That on the morning of November 19th, 1880, said Towle notified the masters of said barges to be prepared to proceed early in the

afternoon of that day and to have their tow-lines between said barges run and made fast so that the propeller could proceed on the voyage without delay, and directed the order in which said barges should be arranged in the tow.

That said propeller J. P. Donaldson came to said barges, which were lying in Buffalo river or creek, about 5 o'clock p. m. of said November 19th, in readiness to begin said voyage, but owing to the failure of the masters and persons in charge of said barge to obey the aforesaid directions and it being impossible for the propeller then to make up the tow in said river, said propeller took in tow the Bay City and proceeded out into the harbor to await the towing out of said Wesley and Eldorado, as was customary and necessary.

That said propeller was compelled to wait for said barges Wesley and Eldorado until 8 o'clock in the evening of said November 19th, and that such delay was attributable to all of said barges and was the primary cause of the damage and injury suffered by said barges and prevented said propeller and barges from making the harbor of Erie in safety, as but for said delay they would have done before the culmination of the storm which eventually caused the stranding of said barges, as hereinafter set forth.

That said propeller and said barges left Buffalo about 8 o'clock in the evening of said November 19th, having on board 120 tons of coal for fuel, but without cargo, and was then and at all times thereafter continued to be and at the time of the loss hereinafter mentioned new, light, staunch, and strong in every respect, well manned, tackled, appointed, and appareled, and had and at all times kept the usual and necessary complement of officers and men stationed at their proper posts on the lookout for the protection and safety of said propeller J. P. Donaldson and her said tow of barges, and with her engines and boilers then and at all times thereafter in good working order and condition; that when said propeller and tow left Buffalo on said voyage the wind was blowing moderately fresh from the southeast, and to avoid the sea and keep in smooth water the course of said propeller and her tow was laid along the southerly shore of Lake Erie. The wind during the night of the 19th and morning of the 20th varied from S. E. to S. S. W., increasing in force, and by noon of the 20th was blowing very fresh from the S. W.

That during the afternoon of the 20th the wind was increasing in velocity, but continued somewhat off the land from southward and westward, and the master of said propeller deemed it advisable to make for the harbor of Erie; that about 8.30 p. m. the wind instantly changed and a squall of wind and snow came from the northwest, blowing a gale, causing the propeller to pay off to the shore with her wheel hard-a-port and her engine working to the full capacity. The said squall lasted about ten minutes, when again the wind shifted to southwest by south, letting the propeller come up, when she immediately headed for the outer point of Erie peninsular, so called, said propeller and her tow being then about 2 miles below Erie piers and nearly abreast of Four Mile creek, so called, and about two miles from shore.

That while running on this course another sudden and violent squall of wind and snow came from the northwest, blowing said propeller's head around toward the land, with her wheel hard-a-port and her engine working to its full capacity, and driving her and her tow bodily towards the southerly shore; that before said second squall the master of said propeller seasonably signalled the barges in tow to make sail and get their anchors in readiness; that said propeller continued to drift with her said tow helpless against the violence of the wind and sea, yet using all her power to prevent herself and said barges going ashore, until the master of said propeller saw that the stranding of said barges was inevitable and that further efforts to prevent the same would involve almost certainly the loss of the propeller and peril the lives of those on board of her without benefit to the barges, when, compelled by necessity and after giving a proper and timely signal to that effect, he caused the tow-line between the propeller and the first barge to be cut.

That said propeller thereafter and before getting away from the shore struck heavily and narrowly escaped going hard aground; that said barges were cast ashore solely by the force of the wind and waves and not in any degree the fault or negligence of
26 the said propeller, her master or crew, and whatever damages said barges or either of them suffered were occasioned by the perils of navigation, though primarily attributable to the delay caused by said barges at Buffalo as aforesaid; that it was impossible for the said propeller in any way to aid said barges after cutting said line as aforesaid or to approach said barges or rescue the crews thereof, owing to the storm and the shoal water, and said propeller, after clearing the shore as aforesaid, was headed for the harbor of Erie, and every effort was made to land at the pier at the entrance of the said harbor for the purpose of procuring relief for the crews of said barges; but so great was the violence of the wind, and said propeller being light, that it was impossible, and said propeller was compelled to enter the bay and there anchor; that said storm of wind *was* snow was so violent, even in said harbor, and so continued until Sunday evening, that it was impossible for those on board said propeller to get ashore or to procure assistance for the stranded barges, in that the master of said propeller repeatedly signalled for a tug, but no response was made to said signal until after the rescue of the crews of said barges.

Respondents on information and belief allege that the said schooner barge Geo. W. Wesley was not wholly lost by the aforesaid stranding, but may be floated and repaired at a moderate expense, and that no effort has been made by libellants since said disaster to avoid further injury to said barge, and they allege that the value of said barge and injury done thereto by the aforesaid stranding is grossly overstated in said libel.

Eleventh. That all and singular the matters herein contained are
27 true; in verification whereof, if denied, the claimants and respondents crave leave to refer to the depositions and proofs to be taken and exhibited herein.

Wherefore these claimants and respondents pray that this hon-

orable court will be pleased to pronounce against the libel herein, and that the same may be dismissed with costs to these claimants, to be taxed.

ROBERT HOLLAND.
H. F. TOWLE.

MAYNARD AND SWAN,
Proctor- for Cl'm'ts and Resp'ts.

UNITED STATES OF AMERICA, }
State of Michigan, County of Wayne, } *ss:*

On this 23rd day of February, A. D. 1881, before me, at Marine City, of St. Clair and State of Michigan, personally appeared Robert Holland and Howard F. Towle, the above-named claimants and respondents, and made oath that they had read the above and foregoing answer by them subscribed and know the contents thereof, and that the same is true of their own knowledge except as to the matters and things therein stated on information and belief, and as to those matters and things they believe it to be true.

V. A. SAPH,
Notary Public, St. Clair County, Mich.

Afterwards, *in* the 28th day of February, A. D. 1881, the said Robeft Holland and Howard F. Towle, by Maynard and Swan, their proctors, came into the said court and filed their answer to the libel of Weltha A. Slyfield against the said propeller J. P. Donaldson in the words and figures following, to wit:

District Court of the United States for the Eastern District of Michigan. In Admiralty.

28 WELTHA A. SLYFIELD, Libellant,
vs.
THE STEAM PROPELLER J. P. DONALDSON, HER ENGINES, BOILERS, Boats, Tackle, Apparel, and Furniture (Robert Holland and Howard F. Towle, Claimants and Respondents).

The claim and answer of Robert Holland and Howard F. Towle, of Marine City, Michigan, owners of the said steam propeller J. P. Donaldson, to the libel of said Weltha A. Slyfield, libellant.

To the Honorable Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan:

And now come the said Robert Holland and Howard F. Towle and claim the said steam propeller J. P. Donaldson, her engines, boilers, boats, tackle, apparel, and furniture, and state that they, the said Holland and Towle, are the sole, true, and *bona fide and true* owners thereof, and that no other person is the owner thereof.

And now for answer to said libel these respondents articulately allege and aver:

First. Respondents have no knowledge, save as informed by said

libel, of the ownership of said barge Eldorado therein mentioned, and leave said libellant to his proof thereof. Respondents admit the burden and employment of said barge and the propeller J. P. Donaldson to be as stated in the first article of said libel.

Second. Respondents admit that said barge was on the 19th day of November bound on the voyage described in the second article of said libel, but deny the remaining allegation- and averments in said article contained.

29 Third. Respondents, said Holland on information and belief and *respondents* Towle of his own knowledge, deny the allegations and averments in the third article of said libel contained and aver that the truth relative to the matters therein referred to is as hereinafter stated and not otherwise.

Fourth. Respondents, answering the fourth article of said libel, said Holland on information and belief and Towle of his own knowledge, deny the same as therein stated and aver that the matters therein contained are in a great part falsely alleged, and that the truth is as hereinafter alleged.

Fifth. Respondents on information and belief admit the truth of the matters contained in the fifth article of said libel, except so much thereof as alleges the condition and value of said barge Eldorado at the time therein mentioned, which they deny.

Sixth. Respondents have no knowledge of the matters contained in the sixth article of said libel, and will require libellants to make their proof thereof.

Seventh. Respondents deny, the said *the said* Holland on information and belief and said Towle of his own knowledge, the matters alleged and averred in the seventh article of said libel as the same are therein stated, and allege and aver that the truth relative to said matters is as hereinafter stated and not otherwise.

Eighth. Respondents deny, the said Holland *and* on information and belief and the said Towle of his own knowledge, that the said propeller J. P. Donaldson, her master or owner, were in fault in any particular as charged in said libel, and more particularly in the eighth article thereof, and deny each and every specification of fault in said article and said libel charged against said propeller,

30 her master and owners, and for a further answer to the matters alleged and averred in said eighth article refer to the matters hereinafter in this their answer set forth.

Ninth. Respondents deny, said Holland on information and belief and said Towle of his own knowledge, that the matters alleged and averred in the ninth and tenth articles of said libel are true.

Tenth. Respondents admit the eleventh article of said libel.

Eleventh. Respondents deny, the said Holland on information and belief and said Towle of his own knowledge, that the matter-referred to in the twelfth article of said libel are true, except that they admit said propeller was, as therein stated, at Marine City.

Twelfth. Respondents, further answering said libel, the said Robert Holland on information and belief and the said Howard F. Towle of his own knowledge, allege and aver that on or about the

19th day of November, 1880, respondent Towle, as master of said propeller J. P. Donaldson, was applied to by the master of said barge Eldorado to tow said barge from Buffalo to Saginaw, in Michigan; that owing to the lateness of the season and indications—ise said Towle declined to contract absolutely for the towage of said barge to any particular place, but would take said barge, with said barges Bay City and Geo. W. Wesley, as far as the condition of navigation would permit for one-sixth of said barge's down freight if towed through to Saginaw, and a proportionate amount thereof for such part of the distance as said propeller might tow said barge; that said Towle in the morning of November 19th, 1880, directed the master of said Eldorado and the masters of the barges Bay City and Geo. W. Wesley to be ready to start early in the
31 *the* afternoon *afternoon* of November 19th, 1880, and to arrange the tow and have the lines run between said barges so that no delay would ensue in getting said barges out of Buffalo creek or river, where they lay; that the masters and persons in charge of each of said barges negligently disregarded said directions, and though said propeller J. P. Donaldson came to said barges about 5 o'clock p. m., prepared to tow said barges, by the negligent disregard of said directions by the masters and crews of said barges said propeller J. P. Donaldson was delayed for three hours in departing from Buffalo with said tow, and said delay was primary cause of the subsequent stranding of said barges and prevented the said propeller and her tow making the harbor of Erie in safety before the culmination of the storm in which they were stranded.

That said propeller J. P. Donaldson was at the time of said stranding of said barges and at all times before and since the same tight, staunch, and strong, and in every respect well manned, tackled, appareled, and appointed for the service in which she was engaged, and had the usual and necessary complement of officers and men stationed at their proper posts and upon the lookout for the protection and safety of said propeller and her tow of barges; that her engines and boilers were in good working order and condition and worked freely to their utmost capacity; that said propeller left Buffalo about 8 o'clock in the evening of November 19th, 1880, having in tow the barges Bay City, Geo. W. Wesley, and Eldorado in the order named; that the wind was then southeast, blowing moderately fresh, and continued from that quarter during the night of the 19th of November, and on that account, as is prudent and customary and to avoid the sea, the course of said propeller and her tow was laid towards the southerly shore of Lake Erie and at
32 a proper distance from shore.

That said propeller and her tow continued on that general course prudently distant from the southerly shore and avoiding the sea-rolling further out; that by noon of November 20th the wind had increased and was southwesterly and very fresh and continued from about that quarter with increasing force until about 8:30 in the evening of November 20th, when instantly a violent squall of

wind and snow came from the northwest, causing the propeller with her tow to pay off to its full capacity, and the master of said propeller signalled said barges to make sail and get their anchors ready. Said propeller and tow were at this time about two miles from ashore and about the same distance below Erie piers. Said squall lasted about ten minutes, when the wind again changed and blew with great violence from a southwesterly direction. Said propeller and tow were then headed for the outer point of Erie peninsula, and had run on that course but a short time when the wind again shifted and another heavy squall of wind and snow came from the northwest, causing said propeller to pay off towards shore and drawing her and the barges in tow rapidly toward the land, the wheel of said propeller being then hard-a-port and her engine working to its full capacity; that said propeller and tow continued thus to drift toward the shore helpless against the storm, though using all her power to save said barges and prevent their going ashore until the leadsman reported but three fathoms of water, when, as a last resort and perceiving that further effort to prevent the stranding of said barges was useless and would involve almost certainly the loss of said propeller and all on board without benefit to the barges or their crews, the master
33 of said propeller ordered the tow-line to be cut on the propeller, and said line was cut after a timely and proper signal to that effect; that after cutting said line said propeller struck heavily, doing some damage to her bottom and with difficulty avoided grounding, and was thereupon headed for Erie harbor, at the entrance to which an unsuccessful effort was made to stop said propeller for the purpose of procuring relief for the crew of the stranded barges, and said propeller was compelled by the severity of the storm of wind and snow prevailing to enter said harbor and there anchor; that said storm continued during the night of the 20th of November and the entire day following with unabated force, and it was impossible for those on board said propeller to communicate with the shore or otherwise procure assistance for the crew of said barges; that the master of said propeller signalled repeatedly for a tug, but could get no response until after the rescue of the crew of said barges.

That the stranding of said barges and all damage and injury by them and each of them suffered was caused by the storm aforesaid and the perils of navigation solely, though attributable primarily to the delay aforesaid, caused by said barges at Buffalo, and was not caused in any degree by or through any fault, negligence, or improper conduct on the part of the owners, master, or crew of said propeller J. P. Donaldson.

That after cutting said line as aforesaid it was impossible for those on board said propeller to approach or render any aid to the crew of said barges or any of them, owing to the storm and the draft of water of the said J. P. Donaldson.

Respondents on information and belief allege that the said barge Eldorado was not wholly lost by the aforesaid stranding,
34 but may be floated and repaired at a moderate expense, and

that no effort has been made by libellant since said disaster to avoid further injury to said barge, and they allege that the value of said barge and injury done thereto by the aforesaid stranding is grossly overstated in said libel.

Thirteenth. That all and singular the matters herein contained are true; in verification whereof, if denies, the claimants and respondents crave leave to refer to the depositions and proofs to be taken and exhibited herein.

Wherefore these claimants and respondents pray that this honorable court will be pleased to pronounce against the libel herein, and that the same may be dismissed with *with* costs to these claimants, to be taxed.

ROBERT HOLLAND.
HOWARD F. TOWLE.

MAYNARD AND SWAN,
For Claimants and Respondents.

UNITED STATES OF AMERICA, }
State of Michigan, County of St. Clair, } *ss:*

On this 23rd day of February, A. D. 1881, before me, at Marine City, in said county and State, personally appeared the above-named claimants and respondents and made solemn oath that they had read the above and foregoing claim and answer by them subscribed and knew the contents thereof, and that the same is true of their own knowledge except as to those matters and things therein stated on information and belief, and as to those matters and things they believe it to be true.

V. A. SAPH,
Notary Public, St. Clair County, Mich.

35 Afterwards, on the 7th day of March, A. D. 1891, the said libellants, Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, came into the said court and filed a stipulation for costs in the words and figures following, to wit:

In the District Court of the United States for the Eastern District of Michigan. In Admiralty.

CHARLES SONSSMITH, LUCIUS P. MASON, JOHN S. ESTABROOK, and HENRY ESTABROOK, Libellants,
vs.
THE PROPELLER J. P. DONALDSON.

We, the undersigned, do hereby agree to be and become liable for all costs to the amount of two hundred and fifty dollars which may be adjudged against said libellants in the cause above entitled, and we hereby acknowledge ourselves liable to pay the same in accordance with the rules and practice of said court.

LUCIUS P. MASON.
J. S. ESTABROOK.
CHARLES SONSSMITH.

Detroit, February 20th, 1881.

That afterwards, on the 24th, 25th, 26th, 27th, 28th, and 30th days of January and the 1st day of March, A. D. 1882, said cause was heard in said district court and the cause was continued for argument.

That afterwards, on the 2nd day of February, A. D. 1882, an order was entered in said court in said cause in the words and figures following, to wit:

36 At a session of the district court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, in said district, on Thursday, the second day of February, in the year of our Lord one thousand eight hundred and eighty-two.

Present: The Honorable Henry B. Brown, district judge.

CHARLES SONSSMITH, LUCIUS P. MASON, John S. Estabrook, and Henry Estabrook and Weltha A. Slyfield, Int'g, *vs.* THE PROP. J. P. DONALDSON, HER ENGINES, ETC.	On Libel and Int'g Libels for Neg. Towing. In Admiralty.

On application of Maynard and Swan, proctors for the claimant, it is ordered that said libel and int'g libel be, and the same are hereby, consolidated.

That afterwards, on the sixth and seventh days of February, A. D. 1883, said causes were argued by counsel for the respective parties and submitted to the court for judgment.

That afterwards, at a session of the district court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, in said district, on Monday, the ninth day of July, in
37 the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Henry B. Brown, district judge.

CHARLES SONSSMITH, LUCIUS P. MASON, John S. Estabrook, and Henry Estabrook and Weltha A. Slyfield *vs.* THE TUG J. P. DONALDSON, HER ENGINES, ETC.	On Libel and Int'g Libel for Neg. Towing. In Admiralty.

This cause having been heretofore heard and submitted to the court for judgment, and the court having taken time to consider of the decree herein and having duly weighed the pleadings and proofs and the arguments of counsel submitted herein, and mature deliberation being had, it is now by the court here ordered, ad-

judged, and decreed that the said libels be, and the same are hereby, accordingly dismissed with costs, to be taxed. Sixty days granted libellants in which to perfect an appeal.

38 That on the fourth day of September, A. D. 1883, the claimants herein came onto said court and filed a bond in appeal in the words and figures following, to wit:

In the District Court of the United States for the Eastern District of Michigan. In Admiralty.

CHARLES SONSSMITH, LUCIUS P. MASON, JOHN S. ESTABROOK, and HENRY ESTABROOK, Owners of the Barge Geo. W. Wesley, and WELTHA A. SLYFIELD, Owner of the Barge Eldorado,	On Libel and Intervening Libel Consolidated for Damages by Neg. Towing.
— —— —.	

Whereas an appeal has been taken by the libellants from the decree of this court made on the ninth day of July, 1883, in a certain cause wherein Charles Sonssmith, Lucius P. Mason, John Estabrook, and Henry Estabrook, owners of the barge Geo. W. Wesley, and Weltha A. Slyfield, owner of the barge Eldorado, are libellants (said libels having been consolidated), against the propeller J. P. Donaldson, her engines, &c., Robert Holland, claimant, to the circuit court of the United States for the eastern district of Michigan:

Now, therefore, the stipulators undersigned hereby stipulate in the sum of five hundred dollars ($500) to pay all damages and costs which shall be awarded against the said appellants by the final decree of said circuit court, and they hereby consent that execution may issue against their good- and chattels, lands and tenements, for such damages and costs.

LUCIUS P. MASON.
CHARLES SONSSMITH.
JOHN S. ESTABROOK.
WELTHA A. SLYFIELD,
By L. L. SLYFIELD,
Her Attorney-in-fact.

GURDON CORNING.
WILLIAM Z. DICKINSON.

Taken and acknowledged before me this — day of ——, A. D. 1883.

—— —.

39 STATE OF MICHIGAN, } ss:
Saginaw County, Eastern District of Michigan, }

Appeared personally Gurdon Corning, William L. Dickinson, of the city of East Saginaw, Saginaw county, Michigan, and made oath that they are worth the sum of one thousand dollars, lawful

money of the United States of America, after the payment of *his* just debts in real estate subject to execution within the eastern district of Michigan.

On this 3rd day of Sept., A. D. 1883, the said Gurdon Corning and William L. Diskinson were sworn to the truth of the above attestation before—

GEO. W. WEADOCK,
A Notary Public, Saginaw Co., Mich.

Afterwards, on the fifth day of September, A. D. 1883, the said libellants came into the said court and filed a claim of appeal in the words and figures following, to wit:

In the District Court of the United States for the Eastern District of Michigan. In Admiralty.

CHARLES SONSSMITH, LUCIUS P. MASON, JOHN S. ESTABROOK, and HENRY ESTABROOK, Owners of the Barge George W. Wesley, and WELTHA A. SLYFIELD, Owner of the Barge Eldorado, *vs.* THE PROPELLER J. P. DONALDSON.	On Libel and Intervening Libel Consolidated for Neg. Towage.

The said Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, owners of the said barge George W. Wesley, feeling themselves aggrieved by the final decree of the district court in the above-entitled cause, hereby appeal therefrom and from the whole thereof to the next circuit court of the United States for the eastern district of Michigan; and the same Weltha A. Slyfield, owner of the barge Eldorado, feeling herself aggrieved by said decree, hereby appeals therefrom and from the whole thereof to the circuit court of the United States for the eastern district of Michigan, and the said appellants hereby give notice that they will, upon said appeal, make new proofs under each allegation of their respective libels and the answers filed in said causes.

CHARLES SONSSMITH,
LUCIUS P. MASON,
JOHN S. ESTABROOK,
HENRY ESTABROOK,
WELTHA A. SLYFIELD,
By MOORE, CANFIELD & WARNER,
Their Proctors.

MOORE, CANFIELD & WARNER,
Proctors for Appellants.

41 *Opinion of Justice Matthews.*

Circuit Court of the United States for the Eastern District of Michigan.

CHARLES SONSSMITH *et al.*, Owners of the Barge "Geo. W. Wesley," *vs.* PROPELLER "J. P. DONALDSON." } In Admiralty.

WELTHA A. SLYFIELD, Owner of the Barge "Eldorado," *vs.* PROPELLER "J. P. DONALDSON." } In Admiralty.

MATTHEWS, *Justice:*

These two libels were consolidated in the district court and dismissed on the hearing. A decree for the libellants was prayed for on two grounds: First, for a loss of the barges by the fault of the propeller in towing the barges on a voyage from Buffalo to Saginaw; second, in case no fault in towing was proven, then for a proportion of the value of the barges lost, upon the principles of a general average, on the ground that they had been voluntarily cast off and lost during a storm for the purpose and with the effect of saving the propeller.

As to the first ground, the evidence justifies and requires the conclusions of the district court. There does not seem to be sufficient ground to impute to the propeller any negligence or failure of duty.

42 If any error was committed, it was a mistake of judgment in the exercise of a discretion necessarily vested in the master of the propeller, and which, if a contrary decision can be supposed to have resulted more favorably, constitutes neither want of skill nor want of care. The loss of the barges under the circumstances must be regarded as resulting from the perils of navigation, and for which under the contract of towage the propeller cannot be held responsible. It is not necessary to recapitulate the proofs in support of this conclusion. They are fully stated, with the reasons justifying it, in the opinion of the learned judge of the district court, as reported in 19 Feb. Rep., 264, in which, upon this part of the case, I fully concur.

There remains, however, the more difficult and doubtful question, whether the libellants are entitled to a decree for a contribution from the appellee, upon the principles of general average, on the ground that the loss of the barges was a sacrifice voluntarily made for the safety of the propeller. The facts and circumstances material in the investigation of this as a question of law are not disputed and are in substance as follows: The J. P. Donaldson was a steam propeller, with a crew of 16 officers and men, built for the carrying trade, not an ordinary tug, having no cargo on board, on the voyage during which the loss complained of occurred, but her fuel,

amounting to about 120 tons. She had in tow three barges, the Bay City, the George W. Wesley, and the Eldorado, in the order named, on a voyage from Buffalo to Saginaw or Bay City. The Bay City was partly laden with coal, the others were light. The George W. Wesley was a schooner barge, the Eldorado was
43 an old propeller bottom. Neither of them had any power of self-propulsion. The contract for towage was for the voyage, the propeller to receive for her service a proportion of the freight earned by each barge. When near Erie, Pennsylvania, in a fierce storm, having been driven by force of wind and waves, and in a blinding snow, they were drifting near the rocks on shore and in imminent peril of stranding, the propeller, having signaled her tow to that effect, cut the towing line and cast them off. They were driven on shore and wrecked. The propeller at once put into the harbor of Erie in safety. It is a reasonable conclusion that if the propeller had not cut loose her tow all would have gone ashore together.

The libels in the present cases do not pray specifically for an adjustment of a general-average loss. On the contrary, they pray for a decree against the propeller for the full amount of the loss, on the ground that it resulted from the breach of duty on the part of the propeller in not properly performing the contract of towage; but, under the prayer for general relief, it is competent for the court to pass such decree as may be required by the proof in the record, although not fully and precisely stated in the libel. In this particular the case of Dupont *v.* Vance, 19 How., 162, is quite in point, and in that case, speaking of jettison of cargo, Mr. Justice Curtis, delivered the opinion of the court, said:

"If it be made to relieve the adventure from a peril which has fallen on all the subjects engaged in it, the risk of which peril was not assumed by the carrier, the charge is to be borne proportionally by *the* all the interest, and there is a lien on each to the extent of its just contributory obligation."

44 In the case of Columbian Ins. Co. *v.* Ashley, 13 Pet., 331, in the learned opinion of Mr. Justice Story, it is shown that the rule as to general average, derived to us from the Rhodian law through the Roman jurisprudence, was not confined to the case of jettison of cargo, although that was the illustration stated in the digest: "That the case of jettison was here understood to be put as a mere illustration of a more general principle is abundantly clear from the context of the Roman law, where a ransom paid to pirates to redeem the ship is declared to be governed by the same rule;" and the doctrine, as received among all maritime nations, was stated to be, "first, that the ship and cargo should be placed in a common imminent peril; secondly, that there should be a voluntary sacrifice of property to avert that peril; and, thirdly, that by that sacrifice the safety of the other property should be presently and successfully attained."

It was generally admitted that, in case of voluntary stranding of the ship, if the vessel was saved, the principle of general average applied; but it was contended by some that it was not so if the

vessel was lost, and such was the opinion of Emerigon, who said: "But it will be a general average if the stranding has been made for the common safety, provided always that the ship be again set afloat, for if the stranding be followed by shipwreck, then it is save who can." 1 Emer. Ins., c. 12, sec. 13, page 614. But, in opposition to this opinion, it was decided by the supreme court that the total loss of a ship did not prevent the application of the
45 principle, saying (page 340), "it is the safety of the property and not of the voyage which constitutes the true foundation of general average;" and in another place (page 343), "for the general principle certainly is that whatever is sacrificed voluntarily for the common good is to be recompensed by the common contribution of the property benefited thereby." The same result had been previously reached by Mr. Justice Washington in Caze *v.* Reilly, 3 Wash. C. C., 298.

In Barnard *v.* Adams, 10 How., 270, it was said that "in order to constitute a case for general average three things must concur: (1) A common danger—a danger in which ship, cargo, and crew all participate—a danger imminent and apparently inevitable except by voluntarily incurring a loss of a portion of the whole to save the remainder; (2) there must be a voluntary jettison, jactus, or casting away of some portion of the joint concern for the purpose of avoiding this imminent peril, *periculi imminentis evitandi causa*, or, in other words, a transfer of the peril from the whole to a particular portion of the whole; (3) this attempt to avoid the imminent common peril must be successful."

In that case the principal question arose upon the proposition urged in the argument, "that if the common peril was of such a nature that the jactus or thing cast away (which was the ship) to save the rest would have perished anyhow or perished inevitably, even if it had not been selected to suffer in place of the whole, there can be no contribution." But this was negatived. Mr. Justice Grier delivered the opinion of the court, saying that—

"It is a denial of the whole doctrine upon which the claim for general average has its foundation. * * * The jactus is
46 said to be sacrificed, not because its chance of escape was separate, but because of its selection to suffer, be it more or less, instead of the whole, whose chances of safety as a whole had become desperate. The imminent destruction of the whole has been evaded as a whole and part saved by transferring the whole peril to another part."

In the case of McAndrews *v.* Thatcher, 3 Wall., 347, Mr. Justice Clifford delivered the opinion of the court, said:

"Natural justice requires that where two or more parties are in a common sea risk and one of them makes a sacrifice or incurs extraordinary expenses for the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure, or, in other words, the owners of the other shares are bound to make contribution in the proportion of the value of their several interests. Courts universally admit that the Rhodian law was the parent of maritime contribution, although in

terms it made no provision for any case of general average, except for that of jettison of goods as the means of lightening the vessel. But the rule as there laid down has never been understood as being confined to that particular case, but has always been regarded as a general regulation applicable in all cases falling within the principle on which it is founded."

Therefore it has been extended, as in that case, to instances of involuntary stranding of the ship when extraordinary expenses are incurred in the successful relief and rescue of both ship and cargo menaced by a common destruction, but only for such as are incurred while the community of interest continues. If the
47 cargo, as in that case, has been separately saved, and has been severed from its connection with the ship and its peril, subsequent expenses incurred for the benefit of the ship alone, and not part of a continuous series undertaken originally on behalf of both interests, are not the subject of a general-average contribution.

"Doubts at one time were entertained," said the Supreme Court in the case of The Star of Hope., 9 Wall., 203–231, "whether a loss occasioned by a voluntary stranding of the vessel, even though it was made for the general safety and to avoid the probable consequences of an imminent peril to the whole adventure, was the proper subject of general-average contribution; but those doubts have long since been dissipated in most jurisdictions, and they have no place whatever in the jurisprudence of the United States." In that case it was also said (page 228):

"Authorities may be found which attempt to qualify this rule and assert that when the situation of the ship was such that the whole adventure would certainly and unavoidably have been lost, if the sacrifice in question had not been made, the party making it cannot claim to be compensated by the other interests, because it is said that a thing cannot be regarded as having been sacrificed which had already ceased to have any value; but the correctness of the position cannot be admitted unless it appears that the thing itself for which contribution is claimed was so situated that it could not possibly have been saved, and that its sacrifice did not contribute to the safety of the crew, ship, or cargo. Sacrifices, when there is no peril, present no claim for contribution, but the greater and the more imminent the peril the more meritorious the claim for such
48 contribution, if the sacrifice was voluntary and contributed to save the associated interest- from the impending danger to which the same were exposed. Such claims have their foundation in equity and rest upon the doctrine that whatever is sacrificed for the common peril of the associated interests shall be made good by all the interest- which were exposed to the common peril and which were saved from the common danger by the sacrifice. * * * It is not necessary that there should have been any intention to destroy the thing or things cast away, as no such intention is ever supposed to exist. On the contrary, it is sufficient that the property was selected to suffer the common peril in the place of the whole of the associated interest-, that the remainder might be saved."

The general doctrine was again stated by the Supreme Court in

the case of Fowler *v.* Rathbone, 12 Wall., 102, in the following comprehensive language:

"Where two or more parties are engaged in the same sea risk and one of *the* them in a moment of imminent peril makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the safety of *the* all the associated interest-, common justice requires that the sacrifice so made or the extraordinary expenses so incurred shall be assessed upon all the interests which were so exposed to the impending peril and which were saved by those means from the threatened danger in proportion to the share of each in the joint adventure."

The interest- usually associated together in reference to which question- of contribution in general average commonly arise
49 are those of ship, cargo, and freight; but the language in which the rule is defined as already quoted does not restrict it to that association of interests. The right of contribution depends upon an equity arising out of the relation of the parties, and is not based upon the contract of carriage. The obligations of the carrier, indeed, as contained in the usual bill of lading do not embrace the case of a part of the cargo carried on deck with the consent of the shipper and not in pursuance of a custom of the particular trade, and the carrier is therefore in such case not liable as such for a jettison of such cargo necessary for the common safety. The loss is by the perils of navigation and excepted from the liability of the carrier. Neither is there any right of contribution as between the deck-load cast overboard and the cargo under deck unless the deck-load was carried in pursuance of a general custom of the trade of which the owners of the other cargo must be presumed to take notice and to assent to. In that event the right of contribution in case of loss by jettison would arise in favor of the cargo so carried on deck, and as between it and the ship it would apply, without reference to such a custom, upon the ground that the ship-owners had consented so to carry it. 2 Pars. Mar. Ins., c. 5, sec. 3, p. 217 *et seq.*, and cases cited. Hence, in the case of Lawrence *v.* Minturn, 17 How., 100, the carrier was exonerated from liability as such for the loss of the deck-load by jettison, but without prejudice to the right of the shipper to claim for a general-average contribution. In cases of jettison of cargo the performance of the contract of affreightment by transportation of the merchandise is excused
50 by a peril of the sea, while the obligation to contribute in general average on the part of the ship and remaining cargo arises out of the relation of the parties, as brought together into a common and associated interest united in a single adventure and saved from a common peril, as appears from the case of Dupont *v.* Vance, 19 How., 162. The right of the ship to contribution is certainly not founded on the bill of lading, and there is no privity of contract between the various and distinct shippers, between whom, nevertheless, the law implies, upon the facts, the obligation to make good their respective shares of a sacrifice made for a common benefit. It is therefore not inconsistent with the essential nature of the principle that the right of contribution should be applied between

other parties and interests where relations are established by contract other than between shipper and ship-owner for the transportation of merchandise. Accordingly the opinion was expressed by Mr. Arnold (2 Mar. Ins., 398) that "if a number of ships are lashed together and one takes fire, and the crews of the others unite in scuttling the burning ship for the safety of the rest, the loss of the ship so sunk is a general-average loss, to which all those saved thereby must contribute." This opinion, based upon continental authorities alone, Mr. Parson (2 Mar. Ins., 217, in note) doubts, and it must be admitted that no judicial precedent to that effect has been found in the decisions of either English or American courts, and that the case as put lacks the necessary element of a common interest united by consent of several owners delivered by the authorized act of a common agent from an imminent peril, threatening the whole by the voluntary sacrifice of a part.

51 The true principle was stated by Mr. Justice Curtis in the case of The John Perkins, reported in 21 Law Reported, 87. That was the case of a libel by the owner of a fishing schooner, the Wyvern, against the John Perkins. The latter was drifting helplessly, inclosed by a field of ice, along the shore of Massachusetts bay, and to avoid an apprehended collision with which the master of the Wyvern cut his cable, which, with the anchor, was lost. The claim was for a contribution in general average for this loss. Mr. Justice Curtis treated the subject in an opinion, from which the following lengthy extract is made:

"But the question here is whether a voluntary sacrifice made by one vessel to avoid or escape an apprehended collision with another vessel makes a case for contribution in general average. It is certainly true that such a claim, when viewed theoretically, has an equity very similar to, if not identical with, that on which the famous Rhodian law was founded, and out of which the more modern doctrines of the law of general average have grown. '*Omnium contributione sarcitur quod pro omnibus datum est.*' Poth. Pand., 14, 2, 1. '*Equissimum enim est, commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt est merces suos sal vos habuerunt.*' *Id.*, 14, 2, 6. At the same time it is quite clear that the Roman law never applied the principle between mere strangers. The Digest (9, 2, 29, 3) says: '*Labeo scribit, si cum vi ventorum navis impulsa esset in funes anchorarum alterius et nautoe funes praecidis sunt, si nullo alio modo nisi praecisis funibus explicare se potiunt nullam actionem dandam.*' This is the precise case

52 under consideration, except that the cable is cut by the mariners of the other vessel, which can scarcely weaken the claim. Emerigon cites this as good law, and refers to the laws of Oleron and Wisby as containing similar rules as to the removal of an anchor. 1 Emer. Ins., 416, c. 12, par. 14. And at the common law there are cases of urgent necessity in which one whose property is destroyed has no action, as pulling down a house to prevent the spread of a fire, as was resolved in Case of Saltpetre, 12 Coke, 13, 16. See, also, Vin. Abr., "Necessity," pl. 8; Governor *v.* Meredith, 4

Term R., 797; Respublica *v.* Sparhawk, 1 Dall., 363; Mayor *v.* Lord, 17 Wend., 290; Russell *v.* New York, 2 Denio, 461.

"But whether an action would or would not lie when the mariners of one vessel can escape only by cutting the cable of another vessel, and do so, the question here is whether the law of general average extends to a case where the cable of a vessel is *but* by its crew to prevent an apprehended collision with another vessel. I am not aware that the right of contribution has ever been extended beyond those who voluntarily embarked in a common adventure. Very *im*minent writers upon maritime law have considered that the right grows out of and depends upon a contract implied by law from the relation created by the contract of affreightment. Such is the opinion of Pothier, *Traite des contrat de louages*, Mar., pt. 2, Art of Pardessus, Droit Com., pt. 3, tit. 4, c. 4, par. 2. Chief Justice Parsons declares, in Whitteridge *v.* Norris, 6 Mass., 131, that the requisites to a case of general average are a contract by which distinct properties of several persons have become exposed to a common peril and a relief from that peril at the expense of one or more of
53 those concerned, who thereupon are entitled to a contribution from the rest, and in the case of Dupont *v.* Vance, 19 How., 162, as well as in Lawrence *v.* Minturn, 17 How., 109, it will be found that the Supreme Court considered that the master, in case of necessary voluntary sacrifice to escape peril, was acting as the authorized agent of all concerned in the common adventure and so bound all by his act, a principle which would hardly apply between mere strangers. I have on a former occasion declared that I did not consider the right to recover a general-average contribution arises from a contract (Sturgis *v.* Cary, 2 Cur. C. C., 384), but from a principle of natural justice that they who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure should unite good the loss which that sacrifice occasioned. But I have never entertained a doubt that from the relation of the parties to a common adventure the law would imply a contract for the purpose of a remedy, nor did I then suppose that it would be implied between strangers who were not united in a common adventure by one or more contracts of affreightment.

"The ancient as well as the modern code of sea laws proceeds upon the assumption that the master, representing all the aggregate interests by holding the office, has the rightful power to judge upon the sacrifice of one of the interests which he thus represented for the benefit of the others, but they afford no ground for the position that he may judge for mere strangers whose property has not been confided to his care. In my opinion the only subjects bound to make contribution are those which are united together in a common adventure and placed under the charge of the master of the vessel, with the authority to act in emergencies as the agent
54 of all concerned and which are relieved from a common peril by a voluntary sacrifice made of one of those subjects. Consequently, I must reject the claim for general average."

The decree of the district court was therefore reversed, but it was further stated in the opinion that the questions were so novel and

attended with so much difficulty and the equitable consideration in favor of some of the claims *were* such that it was not thought fit to charge the appellees with costs.

But the elements wanting to constitute a valid claim for a contribution in general average in the case of the John Perkins seem to be present in the case of this appeal. Here the propeller and the barges were not strangers. They were bound together by the contract of towage. They were interested together in a common adventure. They were engaged to and with each other for the entire voyage and each interested in its successful issue, as the freight earned by each barge was to be shared between it and the propeller as a compensation for its service. The barges were dependent altogether upon the propeller for motive power, neither of them having any means of self-propulsion. They were powerless for any purpose of navigation and could only, by means of a single sail, ground tackle, and steering apparatus, co-operate with the propeller in its control over them. Each barge, indeed, had its own master and crew, but they had no voice in the management of the propeller, in the conduct of their own craft, except in obedience to signals from the propeller. The master of the propeller had charge of the navigation of the whole tow for the voyage, and for the purposes
55 of that navigation and to meet its exigencies was invested with authority to act for all. No ingredient required by the rule to constitute a case for contribution in general average seems to be lacking. There is a common adventure, in which distinct interest- are associated by a maritime contract by which the whole is placed in charge of a common agent authorized to act for all in its prosecution, and by his authority a sacrifice is made of part in the presence of imminent peril threatening the loss of all, which results in the safety of the remainder.

What is there in the circumstances and nature of the case to prevent the application of the law of general average? It is suggested that the obligation to make contribution in such a case is inconsistent with the contract of towage, which alone established the relation between the parties and must regulate their relation, rights, and duties. The contract of towage undoubtedly does not embrace any stipulation which requires such a contribution. The towing vessel is not subject to liabilities as extensive as those of a common carrier of goods. It discharges its whole duty by the performance of the stipulated service with ordinary care and skill. It insure- nothing, and it is excused from the further performance of its contract when that becomes inconsistent with *his* own safety. All that is certainly true. It was no breach of its contract, as has already been admitted in this cause, for the propeller, under the circumstances of necessity into which with its tow it was driven without its fault, to save itself
at the expense of the barges, which were cut loose and cast
56 away upon the rocks and beach, but the case is precisely the same when jettison is made of a part or the whole of the cargo. The sacrifice is not a breach of the contract of the common carrier, but puts an end to it and is justified by the law, notwithstanding the obligation of the contract of carriage, but the contri-

bution is not the less on that account exacted upon principles of equity. In neither case does the duty to equalize the loss grow out of the contract. In both it grows out of the relation established by the contract, and that relation, so far as that duty is concerned, is in substance the same in both cases.

Whether the facts necessary in law to bring the case within the rule as stated would exist in every case of towage or in those cases where the towage is of the more usual kind it is not necessary to consider or decide. The judicial result in the present case is predicated as flowing from the relation of the parties as founded upon their actual agreement and the particular circumstances which arose in the course of its execution. The relation between the parties to a contract of towage will vary according to the terms of the contract, and the liability of each party to the other, as well as to third persons, may be different in different cases. In a case of collision (Sturges *v.* Boyer, 24 How., 110, 122) it was said by the Supreme Court that—

"Whenever the tug, under the charge of her own master and crew and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which for the time being has neither her master nor crew on board, from one point to another over waters where such accessory motive power is necessary
57 or usually employed she must be held responsible for the proper navigation of both vessels, and third persons suffering damage through the fault of those in charge of the vessels must under such circumstances look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means, assuming that the tug is a suitable vessel, properly manned and equipped, for the undertaking, so that no degree of negligence can attach to the owners of the tow on the ground that the motive power employed by them was in an unseaworthy condition; and the tow under the circumstances supposed is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf that a part or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel properly manned and equipped for the enterprise; and, from the nature of the undertaking and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel and were not guilty of any negligence or omission of duty by refraining from such participation."

In like manner in such a case the master of the towing vessel commands and directs not only his own but the vessels in tow, as though all together constituted but one ship. The tow is intrusted to his care, bound to obey his commands and directions, and subject to his power as though it was mere freight. I am unable to perceive why in such a case, of which the present is an instance, the law of general average should not and does not apply. The novelty of its application in such circumstances is the strongest
58 ground for rejecting it, but where the principle plainly in-

cludes it that argument ought not to prevail. The history of the development of the maritime and admiralty jurisdiction in this country is not without the occasional surprise of new discoveries. It was a long time, indeed, before the *the* professional mind of the country accepted the idea that the great rivers and lakes, however navigated in fact, were legally navigable where the tide did not ebb and flow; and the doctrine of Dupont *v.* Vance, 19 How., 162, by which a maritime lien enforceable in admiralty was recognized in favor of a claim for general average by reason of jettison of cargo, was thought to be an innovation upon the English rule, which confines the remedy to an action of assumpsit in the courts of common law or by bill in equity in the court of chancery.

Contracts of towage like that in the present case are exceptional and of comparatively recent origin, peculiar to lake and river navigation. They certainly differ very essentially from the ordinary and usual towing contracts for towing vessels into and out of the port or for short distance in narrow and tortuous channels. It was in reference to one of such that Sir Robert Phillimore spoke in The I. C. Potter, L. R., 3 Adm. and Ecc., 292, where the service to be rendered was defined and limited and for a customary fixed price, and where it was held that, even without formally abandoning the contract, the towing vessel, circumstances of serious danger having supervened not in contemplation of the parties to the contract, was entitled to salvage reward for bringing her tow safely into port, on the ground that she would have been justified in deserting her. The circumstances of the present case preclude the application of any such principle, for in regard to craft, such as the barges
59 which constituted the tow, it cannot be supposed that it was contemplated by the parties that in any emergency they could take care of themselves. The contract in the present case was for the whole voyage, in view of all its perils and contingencies, and completely identified the propeller with her tow for all the purposes of the enterprise, the success of which the towing vessel itself as well as the tow had mutually agreed to share as the sole price to each for their respective contributions to the common interest. The case is more like that of two carriers who combine in a joint service, as where on land one furnishes motive power and an artificial highway, as a railroad charging toll to the other for the vehicle and its contents, being the goods to be carried, or as in the case of New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How., 344, where a steamboat carried goods for an expressman. At any rate, without undertaking to specify in what manner and in what degree the rights and liabilities of the parties are extended beyond those growing out of the more limited and ordinary contract for a mere towage service by such a contract as that now under consideration, it is sufficient in this case to say that it had the effect to establish such a mutuality of interest in the enterprise as to constitute the towing vessels and her barges in tow a unit for the purposes of the voyage, so far that a voluntary sacrifice by the master in authority over all *of* a part for the benefit of the remainder

thereby saved from destruction by a peril of navigation must be compensated upon the principle of general average.

60 The decree of the district court is therefore reversed, and a decree will be rendered in favor of the appellants respectively, in conformity with this opinion, the amount in favor of each to be ascertained by an intermediate reference to a master to state and adjust the proportionate contribution to be recovered against the propeller, upon the principles of a general average, with costs.

61 *Interlocutory Decree.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, on Tuesday, the eleventh day of November, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

CHARLES SONSSMITH, LUCIUS P. MASON, John S. Estabrook, and Henry Estabrook, Owners of the Barge "Geo. W. Wesley, *vs.* THE PROPELLER "J. P. DONALDSON." WELTHA A. SLYFIELD, Owner of the Barge "Eldorado," *vs.* THE PROPELLER "J. P. DONALDSON."	On Appeal from District Court. In Admiralty.

These cases coming on to be heard together, on appeal from the district court of the United States for the eastern district of Michigan, in admiralty, they were argued by counsel for respective parties, and the record of the proceedings of the court below having been seen, inspected, and fully considered by this court, and after mature deliberation had, it is ordered, adjudged, and decreed by this court that the decree and judgment of the court below in these cases be reversed; and it appearing to the court that the said barges "George W. Wesley" and "Eldorado," together with the barge Bay City, constituting the tow of said propeller "J. P. Donaldson" on the 19th day of November, 1880, when near the port of Erie, in the State of Pennsylvania, together with said propeller, by reason of a severe storm then prevailing, were in imminent danger and peril of being *being* stranded upon the rocks; that, to save said propeller, the tow-line connecting said barges to said propeller was cut by order of the master of said propeller, and the said barges were cast off, and the same were driven ashore, stranded upon the rocks, and lost, and that said propeller, by reason of said tow-line being

62 cut, was enable- to reach the port of Erie in safety; it is therefore ordered, adjudged, and decreed that said propeller

be, and she is hereby, declared to be liable to contribute for the loss of said barges upon the principles of general average, and that it be referred to Walter S. Harsha and James J. Clark, as special commissioners of this court, to make an adjustment of said loss and to ascertain and report the amount due to the respective owners of said barges "George W. Wesley" and "Eldorado" upon the principles of general average, and that they report the same to the court with all convenient speed.

63 *Report of James J. Clark and Walter S. Harsha, Special Commissioners.*

In the Circuit Court of the United States for the Eastern District of Michigan.

CHARLES SONNSSMITH, LUCIUS P. MASON, John S. Estabrook, and Henry Estabrook, Owners of the Barge "George W. Wesley," *vs.* THE PROPELLER "J. P. DONALDSON."	In Admiralty. Appeal from District Court.
WELTHA A. SLYFIELD, Owner of the Barge "Eldorado," *vs.* THE PROPELLER "J. P. DONALDSON."	Consolidated Libels.

To the judges of said court:

Mr. Justice Matthews, by whom these causes were heard, having found as a conclusion of law, as appears in his written opinion, filed herein September 11, 1884, that said propeller is in law liable to contribute for the loss of said barges and their cargo upon the principle of general average, and it having been referred to the undersigned, as special commissioners of this court, by decree entered in above causes November 11, 1884, to make an adjustment and ascertain and report the amount due to the respective owners of said barges "George W. Wesley" and "Eldorado" upon the principles of general average, now, therefore, the said special commissioners do respectfully report as follows:

1. That they met from time to time as convenient for parties and counsel and heard the testimony of the witnesses produced by the respective parties, all of which testimony is hereto attached for the information of the court and made a part of this report.

64 2. That from said testimony, together with the opinion, decree, and files in said cause, we find the amount due to the respective owners of the barges "Geo. W. Wesley" and "Eldorado" as follows (finding it necessary under the principles of general average and the opinion of the honorable associate justice heretofore referred to — include the schooner "Bay City," cargo and freight):

Losses to be Contributed for.

Pro. "J. P. Donaldson," paid for repair of damages		$227 40	
Less ⅓ for new		75 80	
			151 60
Sch. "Eldorado," total loss (salvage not exceeding expenses)			5,000 00
Sch. Wesley, salvage		1,200 00	
Expenses of repairs	2,800 00		
Less ⅓ for new	933 33		
		1,866 67	
			3,066 67
Sch. Bay City, cargo and freight, aggregate losses			4,300 00
			12,518 27

Contributing Interests.

			Pays.
Pro. "J. P. Donaldson," saved value	47,848 40		
P'd for in gen'l average	151 60		
		48,000	8,777 70
Sch. Eldorado, gen'l average		5,000	914 34
" "Wesley," saved val	4,933 33		
Paid for in gen'l average	3,066 67		
		8,000	1,462 95
Sch. "Bay City," cargo and freight val. at		7,455	1,363 28
Average, 18.28686 %		68,455	12,518 27

Settlement.

	Dr.	Cr.	Pays.	Receives.
Pro. "J. P. Donaldson"	8,777 70	151 60	8,626 10	
Sch. "Eldorado"	914 34	5,000 00	.....	4,085 66
" "Wesley"	1,462 95	3,066 67	.....	1,603 72
" Bay City, cargo and fr't	1,363 28	4,300 00	.....	2,936 72
	12,518 27	12,518 27	8,626 10	8,626 10

The commissioner- respectfully ask that such compensation be awarded to them for their services as to the court shall seem proper.

All of which is respectfully submitted.

WALTER S. HARSHA,
JAMES J. CLARK,
Special Commissioners.

Detroit, June 18th, 1888.

65 EASTERN DISTRICT OF MICHIGAN, *ss:*

Ralph B. Wilkinson, of the city of Detroit, being duly sworn, says that he served copies of the within report on the attorneys for respective parties June 19th, 1888, as follows: By handing a copy *of* Wm. A. Moore, attorney for libellants, and by leaving a copy at the office of Mr. H. H. Swan, attorney for respondent, in the possession of Mr. Wright, in charge of said office at the time.

RALPH B. WILKINSON.

Sworn to and subscribed before me June 19, 1888.

WALTER S. HARSHA,
U. S. Commissioner, East Dist. of Michigan.

66 *Libellants' Exceptions to Commissioners' Report.*

Circuit Court of the United States for the Eastern District of Michigan.

CHARLES SONSSMITH *et al.*
vs.
THE PROPELLER "J. P. DONALDSON,"

and

WELTHA A. SLYFIELD
vs.
THE PROPELLER J. P. DONALDSON.

The libellants, by Moore and Canfield, their proctors, except to the special commissioners' report made and filed in said consolidation cause on the 18th day of June, 1888, for reasons as follows:

1. Because said special commissioners found that the value of the barge "Eldorado" at the time of her loss was only $5,000, when by the evidence they should have found that it was at least $6,000.

2. Because said special commissioners found that the total damage to the barge "Geo. Wesley" was only $3,066.67, when by the evidence they should have found that it was at least $5,000.

3. That said special commissioners by their report found that the barge Bay City, her cargo and freight, were entitled to be contributed for in the sum of $7,455.00, when under the evidence they would not have found that the said barge "Bay City," her cargo and freight, should not have been contributed for in any sum whatever, or, if any sum, such sum should not have exceeded $4,300.

MOORE AND CANFIELD,
Proctors for Libellants.

Filed June 27th, 1888.

WALTER S. HARSHA, *Clerk.*

67 *Claimants' Exceptions to Commissioners' Report.*

In the Circuit Court of the United States for the Eastern District of Michigan. In Admiralty.

CHARLES SONSSMITH, LUCIUS P. MASON, John Estabrook, and Henry Estabrook, Owners of the Barge "George W. Wesley," *vs.* THE PROPELLER "J. P. DONALDSON."	Appeal from District Court.
WELTHA A. SLYFIELD, Owner of the Barge "Eldorado," — THE PROPELLER "J. P. DONALDSON."	Consolidated Libel.

Claimants' exceptions to report of commissioners.

And now comes Robert Holland, claimant of the propeller J. P. Donaldson, and excepts to the report of the commissioners, to whom it was referred, to ascertain and report the damages of libellants, which report has been duly filed in this cause, and for grounds of exception alleges as follows:

First. That said commissioner- erred in finding the amount due libellant Slyfield for the value of the barge "Eldorado" to be the sum of $5,000, whereas the value of said barge did not exceed the sum of $3,500, as appears by the testimony in said cause.

Second. Said commissioners erred in allowing as the amount due libellant Slyfield the value of property removed from said barge "Eldorado" and stolen or lost subsequently to the stranding of said barge mentioned in the pleadings in this *in this* case.

Third. That said commissioner- erred in allowing libellant Slyfield the cost and expenses incurred in transporting to St.
68 Clair property saved from the said barge "Eldorado," and in setting such cost and expenses against the value of said saved property.

Fourth. That said commissioners erred in allowing only the sum of $4,300 as and for the loss of the schooner "Bay City," her cargo and freight, to be contributed for, whereas said commissioners, under the testimony in this cause, should have found that the loss occasioned by the stranding of said schooner "Bay City" was and is the sum of $9,800.

Fifth. That said commissioners erred in their finding that the saved value of the propeller J. P. Donaldson was the sum of $47,848.40, whereas the testimony shows the sum of $42,000 at the time of said stranding.

Sixth. That said commissioners erred in their finding that the saved value of the schooner "G. W. Wesley" was only the sum of $4,933.33, whereas, under the testimony in this cause, the saved

value of said schooner was not less than $7,000, and said commissioners should have so found.

Seventh. That said commissioners erred in their finding and report that said propeller J. P. Donaldson should be charged with the payment of the sum of $8,626.10, whereas, under the order of reference in this cause and the testimony therein, said sum is greatly in excess of the amount justly chargeable against said propeller J. P. Donaldson.

Eighth. That said commissioners erred in charging the schooner George W. Wesley and the owners thereof only the sum of $1,462.95 as their contribution to the loss referred — in said report, whereas said schooner should have *as said schooner should have* charged the sum of, to wit, $2,000 as her share of said loss.

Ninth. That said commissioner- erred in charging the schooner Bay City and cargo onl*t* the sum of $1,363.28 as the amount
69 to be contributed to said loss by said schooner and cargo, whereas said schooner and cargo should have been charged the sum of, to wit, $2,000 as their share of said loss.

H. H. SWAN,
MAYNARD AND SWAN,
Proctors for Claimant.

Detroit, June 29, 1888.

Filed June 29th, 1888.

WALTER S. HARSHA, *Clerk.*

70 *Exceptions to Report of Special Commissioners Argued and Submitted.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, on Tuesday, the sixteenth day of October, in the year one thousand eight hundred and eighty-eight.

Present: The Honorable Howell E. Jackson, circuit judge, and the Honorable Henry B. Brown, district judge.

CHARLES SONSSMITH *et al.* } Appeal in Admiralty, Before Full Bench.
PROPELLER "J. P. DONALDSON." }

This cause, coming on to be heard upon the report of James J. Clark and Walter S. Harsha, special commissioners, and the exceptions filed thereto, is argued by counsel for respective parties and submitted.

71 Circuit Court of the United States for the Eastern District of Michigan.

CHARLES SONSSMITH *et al.*, Owners of the Barge "George W. Wesley," *vs.* THE PROPELLER "J. P. DONALDSON," and WELTHA A. SLYFIELD, Owner of the Barge "Eldorado," *vs.* THE PROPELLER "J. P. DONALDSON."	Feb. 14, 1889. Consolidated Libels. Appeal from District Court. On Exceptions to Report of Special Commissioner.

The testimony taken before the special commissioner and submitted with this report under the reference heretofore directed in the above-entitled causes leaves the questions raised by the exceptions on the part of libellants and respondent to said report in respect to the value of the several vessels and of the injury sustained by or the expenses incurred in the recovery and repair of the barge "Geo. W. Wesley" in considerable doubt, but, after a careful examination of the proof in the light of all the surrounding circumstances preceding and following the disaster for the losses attending which the propeller "Donaldson" is required to contribute on the principle of general average, the court has reached the following conclusions, viz:

1st. That the propeller "J. P. Donaldson" should be valued on Nov. 20th, 1880, the date of the disaster, at the sum of forty-one thousand dollars ($41,000.00).

72 2nd. That for the repair of the damages said propeller sustained the sum of two hundred and twenty-seven $\frac{40}{100}$ dollars was expended, and that after deducting $\frac{1}{3}$rd new for old there is left the sum of $151.60 as the loss which said propeller should be contributed for as found by the report of the special commissioners.

3rd. That the value of the barge "Eldorado" should be fixed on Nov. 20th, 1880, at the sum of four thousand dollars ($4,000) instead of ($5,000) as reported by the special commissioners, and that said barge having proved a total loss should be contributed for at said sum of $4,000. The court is of the opinion from the evidence that the salvage from the "Eldorado" did not exceed the expenses of saving the same as reported by the special commissioners, so that the "Eldorado" in a restatement or readjustment of the account will be valued and contributed for at the sum of $4,000.00.

4th. That the "George W. Wesley" should be valued at date of the disaster, Nov. 20, '80, at the sum of $9,000.00; that the expenses of salvage and repairs of said barge should be, as reported by said special commissioners, at the sum of $1,200 and $2,800 respectively, and that deducting $933.33 from the latter sum under the rule of $\frac{1}{3}$rd new for old leaves the sum of $1,866.67 as the expenses of her repairs, making the sum of her losses $3,066.67 as reported. The saved value of the said "Geo. W. Wesley" should be fixed at the

sum of five thousand nine hundred and thirty-three $\frac{33}{100}$ dollars ($5,933.33) instead of $4,933.33 as reported.

5th. The barge "Bay City" and her cargo were properly taken into the account by the special commissioners. The principle of a general-average contribution could not be correctly applied
73 without including them. The fact that the "Bay City" or her owner was not a party to the litigation neither enlarges the rights of those who were the actual litigants nor increases the liability of the propeller "Donaldson." The "Bay City" and her cargo, under the proof, should be valued at the sum of ten thousand eight hundred and forty dollars ($10,840.00) on the 20th Nov., 1880, and the loss sustained by the stranding of said schooner should consequently be fixed at an amount exceeding $4,300.00 as reported by the special commissioners.

6th. The amounts chargeable to the "Geo. W. Wesley" and her owners and to the "Bay City" and cargo or her owner as their contribution to the losses sustained will accordingly have to be readjusted on the basis of the foregoing valuations.

7th. From the foregoing conclusions it follows that the exceptions filed by libellants to the report of the special commissioners are not well taken and the same are disallowed, and that the exceptions filed by respondent, except the second and third of said exceptions, are well taken and are sustained to the extent and in the manner above indicated.

If counsel cannot themselves restate the account in accordance with the foregoing rulings the matter will be referred back to the special commissioners with directions to restate or readjust the account in conformity with the values and findings as hereinbefore indicated. The costs of the reference will follow the decree directing the same. The special commissioners will be allowed a reasonable fee or compensation for their services, which will be divided, one-half thereof being chargeable against the propeller "J. P. Donaldson" and the other half against the owners of the
74 "Geo. W. Wesley" and the "Eldorado." If counsel and the commissioners cannot agree upon the amount of such compensation the court will hereafter fix the same.

Upon the question as to whether the present cases call for or involve the application of the principle of general average the circuit justice and the circuit judge are divided in opinion, the circuit justice holding that the principle of general average does apply and that the propeller "J. P. Donaldson" is liable thereunder to contribute for the losses sustained by the stranding of the barges "Eldorado" and "Geo. W. Wesley," and the circuit judge being of the opinion that the principle of general average does not apply to a case of this character and that the propeller "J. P. Donaldson" cannot properly be made to contribute for the losses sustained by said barges on that basis, and on this question of difference between them they will certify a division of opinion to the Supreme Court of the United States, which certificate counsel can prepare and submit for their signature after the account has been restated or recast as above indicated and the exact amounts ascertained, for which a

decree will go against the propeller "Donaldson," in conformity with the opinion and judgment of the circuit justice, subject to the division of opinion to be certified to the Supreme Court on the question of said propeller's liability to make contribution in a case like to present.

Decree will be entered accordingly.

HOWELL E. JACKSON,
Circuit Judge.

Feb'y 11, 1889.

75 *Second Report of Special Commissioners.*

CHARLES SONSSMITH *et al.* vs. J. P. DONALDSON. } No. 6941.

Losses to be Contributed for.

Pro. J. P. Donaldson, paid for repairs of damages		227 40	
Less ⅓ for new		75 80	
			151 60
Sch. Eldorado, total loss (salvage not exceeding expenses)			4,000 00
Wch. Wesley, salvage expenses		1,260 00	
Expense of repairs	82,800 00		
Less ⅓ for new	933 33		
		1,866 67	
			3,066 67
Sch. Bay City, cargo & freight, aggregate losses			10,840
			18,058 27

Contributing Interests.

		Amounts.	Pays.
Pro. J. P. Donaldson, saved value	41,000 00		
Paid for " in gen'l average	151 60		
		41,151 60	11,434 20
Sch. Eldorado " " "		4,000 00	1,111 42
Sch. Wesley, saved value	5,933 33		
Paid for in gen'l average	3,066 67		
		9,000 00	2,500 70
Sch. Bay City, cargo and freight, p'd for in gen'l avg		10,840 00	3,011 95
		64,991 60	18,058 27

Settlement.

	Dr.	Cr.	Pays.	Receiver.
Pro. "J. P. Donaldson"	11,434 20	151 60	11,282 60	
Sch. Eldorado	1,111 42	4,000 00	.....	2,888 58
" Wesley	2,500 70	3,066 67	.....	565 67
" Bay City	3,011 95	10,840	.....	7,828 05
	18,058 27	18,058 27	11,282 60	11,282 60

JAS. J. CLARK,
WALTER S. HARSHA,
Special Commissioners.

Detroit, Sept. 28, 1889.

Filed Sept. 28, 1889.

WALTER S. HARSHA, *Clerk.*

76 *Decree Entered in Favor of Geo. W. Wesley.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, on Thursday, the third day of October, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Howell E. Jackson, circuit judge, and the Honorable Henry B. Brown, district judge.

CHARLES SONNSMITH, LUCIUS P. MASON, JOHN S. ESTABROOK, and HENRY S. ESTABROOK, Owners of the Barge "Geo. W. Wesley," *vs.* THE PROPELLER J. P. DONALDSON.	Appeal from District Court. By Judge Jackson.

This cause having been fully argued by counsel on either side upon the exceptions filed to the report of the special masters and the records and proceedings of the court below having been seen, inspected, and fully considered by this court, and mature deliberation being had thereupon, it is now considered, adjudged, and decreed by this court that libellant is entitled to recover in general average according to the 2nd report of the commissioner to whom it was referred back against said propeller "J. P. Donaldson" in the sum of five hundred and sixty-five and $\frac{97}{100}$ dollars ($565.97), together with the costs of suit, to be taxed in the court below and in this court; and it appearing that Leonard B. Parker and William B. Morley are sureties for and on behalf of the owners of said "J. P. Donaldson," it is considered, adjudged, and decreed that unless the said damages and costs *to* be paid within ten days from this date execution for the same do issue against the claimant, Robert Holland, and also against his said sureties.

77 *Decree Entered in Favor of the Eldorado, etc.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, on Thursday, the third day of October, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Howell E. Jackson, circuit —, and the Honorable Henry B. Brown, district judge.

WELTHA A. SLYFIELD, Owner of the Barge "Eldorado," *vs.* THE PROPELLER "J. P. DONALDSON."	On Appeal from District Court. By Judge Jackson.

This cause having been fully argued by counsel on either side, upon the exceptions filed to the report of the special masters, and

the records and proceedings of the court below having been seen, inspected, and fully considered by this court, and mature deliberation being had thereupon, it is now considered, adjudged, and decreed by this court that libellant is entitled to recover in general average according to the 2nd report of commissioners to whom it was referred back against said propeller "J. P. Donaldson" in the sum of twenty-eight hundred and eighty-eight and $\frac{58}{100}$ dollars ($2,888.58), together with the costs of suit, to be taxed in the court below and in this court; and it appearing that Leonard B. Parker and William B. Morley are sureties for and on behalf of the owners of said J. P. Donaldson, it is considered, adjudged, and decreed that unless the said damage and costs be paid within ten days from this date execution for the same do issue against Robert Holland, claimant, and also against his said surety.

78 *Petition for Rehearing and Stay of Proceedings.*

Circuit Court of the United States for the Eastern District of Michigan.

CHARLES SONSSMITH, LUCIUS P. MASON, JOHN ESTABROOK, and HENRY ESTABROOK, Owners of the Barge "Geo. W. Wesly,"
vs.
THE PROPELLER "J. P. DONALDSON."

WELTHA A. SLYFIELD, Owner of the Barge "Eldorado,"
vs.
THE PROPELLER "J. P. DONALDSON."

And now comes Robert Holland, claimant of said propeller "J. P. Donaldson" and respondent in the above-entitled causes, and prays the court to vacate and set aside the final decrees entered in said causes in favor of said libellants Charles Sonssmith, Lucius P. Mason, John Estabrook, and Henry Estabrook and said libellant Weltha A. Slyfield, and to grant a rehearing thereof for the following reasons, viz:

First. Because upon the facts found in said causes neither the said propeller "J. P. Donaldson" nor respondent as owner thereof is liable, under the admiralty and maritime *and maritime* law of the United States, in general average or otherwise, for the loss or any part of the loss suffered by libellants Slyfield as owner of the schooner "Eldorado" or the loss or any part of the loss suffered by libellants Sonssmith, Mason, and Estabrook as owners of the schooner "George W. Wesley."

Second. Because said decrees are erroneous in that the same do not conform to the cases made by the pleadings in said causes, and the same are unjust and inequitable.

79 Third. Because said decrees are erroneous in that the same awarded costs to said libellants upon the issues found therein in favor of claimants and respondents instead of awarding costs on said issues to claimants of said propeller "J. P. Donaldson."

Wherefore petitioner prays that the court will vacate and set aside the said decrees and grant a rehearing in said causes, and that it will reconsider its opinion and judgments therein to the end that full and final justice may be done in the premises, and that pending the hearing and decision of the court on this petition all further proceedings under said decrees be stayed until the further order of this court.

ROBERT HOLLAND,
Respondent and Petitioner,
By H. H. SWAN, *His Proctor.*

MAYNARD AND SWAN,
Proctor for Respondents and Petitioner.
H. H. SWAN, *Of Counsel.*

Circuit Court of the United States for the Eastern District of Michigan.

CHARLES SONSSMITH, LUCIUS P. MASON, John Estabrook, and Henry Estabrook, Libellants and Appellants, *vs.* PROPELLER "J. P. DONALDSON," HER BOATS, ENGINES, BOILERS, ETC.	Appeal from District Court. In Admiralty. Consolidated Cases.
WELTHA A. SLYFIELD, Libellant and Appellant, *vs.* PROPELLER "J. P. DONALDSON," HER ENGINES, BOILERS, BOATS, ETC.	

GENTLEMEN: Please to take notice that on the petition for rehearing filed in the above-entitled causes, with a copy of Monday,
80 the fourth day of November, A. D. 1889, at the opening of court on that day or as soon thereafter as counsel can be heard, to vacate and set aside the final decree entered in said causes and to reconsider its opinion and judgments therein and to grant a rehearing in said causes, and further to stay all proceedings under said decree, pending the argument and decisions of the court on said petition and until the further order of the court in these causes.

Yours, etc., MAYNARD & SWAN,
Proctors for Petitioner, Robert Holland, Respondent in the Above-entitled Causes.

To Messrs. Moore and Canfield, proctors for libellants Sonssmith *et al.*, owners of schooner "G. W. Wesley," and proctors for libellants Weltha A. Slyfield, owner of schooner "Eldorado."

Filed October 30, 1889.

WALTER S. HARSHA, *Clerk.*

81 *Orders Vacating Decrees.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, on Saturday, the second day of November, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Henry B. Brown, district judge.

CHARLES SONSSMITH, LUCIUS P. MASON, JOHN S. ESTABROOK, and HENRY ESTABROOK
-s.
PROPELLER "J. P. DONALDSON." } By Judge Jackson.

In this cause it is ordered that the decree entered in favor of said libellants October 3rd, 1889, for the sum — five hundred and sixty-five dollars and ninety-seven cents and costs be, and the same is hereby, vacated, and cause is continued until next term for rehearing.

WELTHA A. SLYFIELD
vs.
PROPELLER "J. P. DONALDSON." } By Judge Jackson.

In this cause it is ordered that the decree entered in favor of said libellant October 3rd, 1889, for the sum of $2,888.58 and costs be, and the same is hereby, vacated and cause is continued until next term for rehearing.

82 *Final Decree.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, on Monday, the ninth day of November, in the year one thousand eight hundred and ninety-one.

Present: The Honorable Howell E. Jackson, circuit judge, and the Honorable Henry H. Swan, district judge.

CHARLES SONSSMITH, LUCIUS P. MASON, John S. Estabrook, and Henry Estabrook, Owners of the Barge, 1, Geo. W. Wesley, 1, Appellants,
vs.
THE PROPELLER "J. P. DONALDSON," HER ENGINES, ETC.

WELTHA A. SLYFIELD, Owner of the Barge Eldorado, Appellant,
vs.
THE PROPELLER "J. P. DONALDSON," HER ENGINES, ETC.

Cases Consolidated on Appeal from the District Court of the United States for the Eastern District of Michigan. In Admiralty.
Before Judge Jackson.

These causes having been argued by counsel for the respective parties upon the exceptions filed to the report made by the special

commissioner to whom the same were referred by the decree of this court made and entered therein on the 11th day of November, 1884, to make an adjustment and report the amount due to the libellants respectively, as owners of the barges "Geo. W. Wesley" and "Eldorado," upon the principles of general average, and the same having been duly considered by the court and mature deliberation having been had thereon, and it appearing that the said propeller "J. P. Donaldson" had taken said barges in tow upon a contract whereby the said propeller was to have a proportion of the freight of
83 said barges for towage services, and while pursuing her voyage with her barges in tow in a violent storm they were driven on a lee shore, and from the severity of the storm they were all in imminent danger of being wrecked and lost; and, the said propeller being no longer able to hold the said barges or tow them away from shore, the master of the propeller voluntarily cut and cast off the line of said barges, and they were carried ashore, wrecked, and lost, and said propeller was there enabled to reach the harbor in safety; and it further appearing that the said casting off and the necessity therefor and the subsequent loss of the barges was without fault on the part of the said propeller "J. P. Donaldson," officers, and crew, and it appearing to the court that there is due from said propeller "J. P. Donaldson," upon the basis of an adjustment in general average, for the loss of and damages to said barges as aforesaid, *the* said libellants, Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, as owners of the said barge "Geo. W. Wesley," the sum of $565.97, with interest thereon from the 3rd day of October, 1889, and to the said Weltha A. Slyfield, as owner of the barge Eldorado, $2,883.58, with interest from the 3rd day of October, 1889; and it further appearing that the said propeller "J. P. Donaldson" has been duly bonded by Robert Holland, as claimant and owner thereof, with Leonard B. Parker and William B. Morley as sureties by their bond or stipulation, in the sum of fifteen thousand dollars, to answer the claim of said Charles Sonssmith, Lucius P. Mason, John Estabrook, and Henry Estabrook, conditioned to abide the decree of this court and to pay the award thereof, and assenting that unless they should so do execution should issue against them;

And it further *further* appearing that the said propeller has also been bonded by the said Robert Holland, as claimant and owner thereof, with Phineas H. Clark, John S. McNeil, and Joseph Babel, as sureties, by their bond or stipulation, in the sum of eighteen thousand dollars, to answer to the claim of Weltha A.
84 Slyfield, and consenting that unless they should do so execution should issue against them:

Now, therefore, on motion of Moore and Canfield, proctors for said appellants, it is ordered, adjudged, and decreed that said loss be adjudged as a general-average loss to which the said propeller "J. P. Donaldson" should contribute on the principles of general average, and that the said Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, owners of the said barge "Geo. W. Wesley," do recover as and for the said general-average

contribution of said propeller against the said Robert Holland, as owner and claimant of the said propeller "J. P. Donaldson," and Leonard B. Parker and William B. Morley, as sureties, the sum of six hundred thirty-seven $\frac{29}{100}$ dollars, with costs of suit in both courts, and that unless the same shall be paid into the registry of this court within twenty days from its date execution do issue therefor in due form against the said claimants and sureties on said bond or stipulation; and on like motion it is further ordered that the said Weltha A. Slyfield, as owner of said barge Eldorado, do recover as and for the said general-average contribution of said propeller against said Robert Holland, as owner and claimant of the said propeller "J. P. Donaldson," and against the said Phineas H. Clark, John S. McNeil, and Joseph Babel, as sureties as aforesaid, the sum of three thousand two hundred and forty-four and $\frac{81}{100}$ dollars, with costs of suit in both courts; and that unless said damages and costs shall be paid into the registry of this court within twenty days from this date execution issue therefor against the said Robert Holland, Phineas H. Clark, John McNeil, and Joseph Babel, sureties as aforesaid.

85 *Claim on Appeal.*

In the United States Circuit Court of Appeals for the Sixth Circuit.
In Admiralty.

CHARLES SONSSMITH, LUCIUS P. MASON, John S. Estabrook, and Henry Estabrook, Owners of the Barge "George W. Wesley," Libellants and Appellees,

vs.

THE PROPELLER "J. P. DONALDSON," Her Engines, etc., Defendant and Ap-ellant; Robert Hoolland and Jane Towle, Administratrix of the *Easte* of Howard Towle, Deceased, Claimants and Appellants,

and

WELTHA A. SLYFIELD, Owners of the Barge "Eldorado," Libellants and Ap-ellee,

vs.

THE PROPELLER J. P. DONALDSON, Her Engines, etc., Defendant and Appellant; Robert Holland and Jane Towle, Administratrix of the Estate of Howard Towle, Deceased, Claimants and Appellants.

Cases Consolidated in the District Court of the United States for the Eastern District of Michigan. In Admiralty.

To the honorable the judges of the United States circuit court of appeals for the sixth circuit:

The appeal of the above-named appellants respectfully showeth, that on or about the 21st day of December, A. D. 1880, the above-

named libellants, Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, as owners of the barge George W. Wesley, and the above-named libellant, Weltha A. Slyfield, as owner of the barge Eldorado, exhibited their respective libels in the district court of the United States for the eastern district of Michigan against the said propeller J. P. Donaldson, her engines, boats, tackle, apparel, and furniture, and against all persons having or
86 claiming any interest therein, each claiming in their respective libels the sum of several thousand dollars, praying, among other things, for the reasons set forth in said libels respectively that these appellants might be condemned to pay the demands of said libellants and costs in said libels respectively mentioned; that process issued out of said court, having been served on the said propeller, and your other appellants above named, having claimed the said propeller in due form, did, on or about the 28th day of February, 1881, file their answers to the said libels respectively in the district court, praying that the libels be dismissed, with their costs in that behalf, as by reference to the said libels and to the said answers may more fully appear; and by the order and decree of the said court said two cases were consolidated, and thereafter all proceedings were had as if the pretended causes of action set up in said two separate libels had been contained and united in one suit.

That the said cause came on to be heard before the Honorable Henry B. Brown, judge of the said district court, on or about the 24th day of January, A. D. 1882, upon the depositions and proofs taken in said cause and the testimony and proofs adduced by the respective parties, and said judge, having advised thereon, on the 9th day of July, A. D. 1883, made a decree or sentence in said cause whereby it was sentenced and decreed that the said libels be dismissed and your respondents and appellants recover against the libellants their costs in that behalf incurred and expended.

That thereafter, to wit, on or about the 5th day of February, A. D. 1883, the said libellants and appellees herein filed their appeal with bond, and appealed said cause to the circuit court of the United States for the eastern district of Michigan.

That the said cause came on to be heard upon said appeal
87 before the Honorable Stanley Matthews, justice of the circuit court of the United States for said district, upon the record transmitted from the district court, as required by law, and the said justice, having advised thereon, on the 11th day of November, A. D. 1884, made a decree or sentence in said cause whereby it was, among other things, sentenced and decreed that the libellants in said cause recover against these appellants upon the theory and basis following, to wit:

That the said propeller had taken said barges in tow upon a contract whereby the said propeller was to have one-third of the freights of said barges for towage services, and while pursuing her voyage with her barges in tow in a violent storm all were driven on a lee shore, and from the severity of the storm there was danger of loss of both the propeller and the barges, and said propeller, being

no longer able to hold the said barges or *two* them away from shore, cut and cast off the line of said barges, and they were carried ashore, wrecked, and injured, and said propeller reached the harbor in safety; that said casting off and necessity therefor and the subsequent loss of the barges was without fault on the part of the said propeller J. P. Donaldson, her officers and crew, and that by reason of the premises the said J. P. Donaldson was bound to contribute toward the amount of the loss of and damage to said barges as aforesaid to the libellants respectively upon the basis of an adjustment in general average; upon which decree a reference was had to the clerk of the court, who reported the sums due upon that basis to said libellants; which report, on the 10th day of November, A. D. 1891, was confirmed by the said court, and the final decree of said court was on said last-named day entered, whereby it was adjudged and ordered that the libellants Charles Soussmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, as the owners of the said barge Geo. W. Wesley, recover of the appellants and their
88 stipulators by reason of the premises the sum of six hundred thirty-seven $\frac{29}{100}$ dollars (634.29), and that the libellants Weltha A. Slyfield, as owner of the barge Eldorado, recover of the appellants and their stipulators the sum of three thousand two hundred forty-four and $\frac{81}{100}$ dollars ($3,244.81), together with costs, as by reference to the said decree may more fully appear.

And these appellants are advised and insist that the said decree is erroneous inasmuch as the said libellants were not entitled to any general-average contribution or to any recovery whatever against appellants.

And these appellants assign and specify the following errors, which they assert and intend to urge upon this appeal:

That the said decree of the circuit court is erroneous—

1. For that the said decree failed to find and decree that the propeller was absolved from further duty and obligation when, by a *vis major*, without fault or negligence of the propeller, her master and crew, in any respect contributing thereto, further performance became impossible of the towage contract theretofore existing between the propeller and said barges.

2. In finding and decreeing that there was such community of interest between the said propeller J. P. Donaldson and the said barges or either of them, as is required to furnish the basis for general-average contribution.

3. In finding and decreeing that the libellants are entitled to have an account stated and adjusted of general-average losses of the said loss of and damage to said barges respectively, and to have a part thereof apportioned upon the propeller J. P. Donaldson as a contributing interest.

4. In allowing and decreeing in favor of the libellants for a general-average contribution from the said propeller J. P. Donaldson under the circumstances and facts found as aforesaid.

89 5. For that decree reversed instead of affirming the decree of the district court herein.

6. For that it allows and decreed in favor of libellants for any sum whatever.

7. For that it — not dismiss the libels with costs.

And these appellants, for these and other reasons, appealed from the whole of said decree in favor of said Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, as owners of said barge Geo. W. Wesley, and in favor of the said Weltha A. Slyfield, as owners of the said barge Eldorado, to the United States court of appeals for the sixth circuit, and on the said appeal they intend to have said cause heard anew in the court of appeals on the pleadings and proofs in the district court and in the circuit court, and they pray that the said decree in favor of the said Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook and in favor of the said Weltha A. Slyfield and every part thereof may be reversed with costs, or such other decree thereupon made as to the said United States court of appeals shall seem just, and that the said appellees be condemned to pay to these appellants their costs and damages in the premises.

ROBERT HOLLAND AND
JANE TOWLE,
Administratrix of the Estate of Howard Towle, Deceased,
By HARVEY D. GOULDER,
Proctor for Appellants.

The appeal asked for in the above-entitled cause is allowed.

HOWELL E. JACKSON,
Circuit Judge.

Nov. 28th, 1891.

Filed Nov. 30, 1891.

WALTER S. HARSHA, *Clerk.*

90 United States Circuit Court of Appeals for the Sixth Circuit.

I, Walter S. Harsha, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing 92 pages contain the original order of this court of October 13, 1892, and copies of the pleadings, decrees, and opinions of the district and circuit courts in the case of The Propeller "J. P. Donaldson," Robert Holland, claimant and appellant, *vs.* The Barge "Eldorado," Weltha A. Slyfield, owner, and The Barge "George W. Wesley," Charles Sonssmith, Lucius P. Mason, John S. Estabrook, and Henry Estabrook, owners, No. 19, October term, 1892, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of Cincinnati, this twenty-eighth day of November, A. D. 1892.

Seal United States Circuit Court of Appeals, Sixth Circuit.

WALTER S. HARSHA,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] United States circuit court of appeals for the sixth circuit. The Propeller "J. P. Donaldson" *et al. vs.* The Barge "Eldorado" *et al.* Clerk's certificate.

Endorsed on cover: Case No. 15,231. U. S. circuit court of appeals, 6th circuit. Term No., 202. The Propeller "J. P. Donaldson," Robert Holland, claimant, appellant, *vs.* The Barge "Eldorado," Weltha A. Slyfield, owner, and The Barge "George W. Wesley," Charles Sonssmith *et al.*, owners. Filed December 12th, 1892.

In the Supreme Court U. S.
FILED
DEC 9 1895
JAMES H. McKENNEY,
CLERK

7-599

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 209 29.

THE PROPELLER "J. P. DONALDSON," ROBERT HOLLAND, CLAIMANT, APPELLANT.

vs.

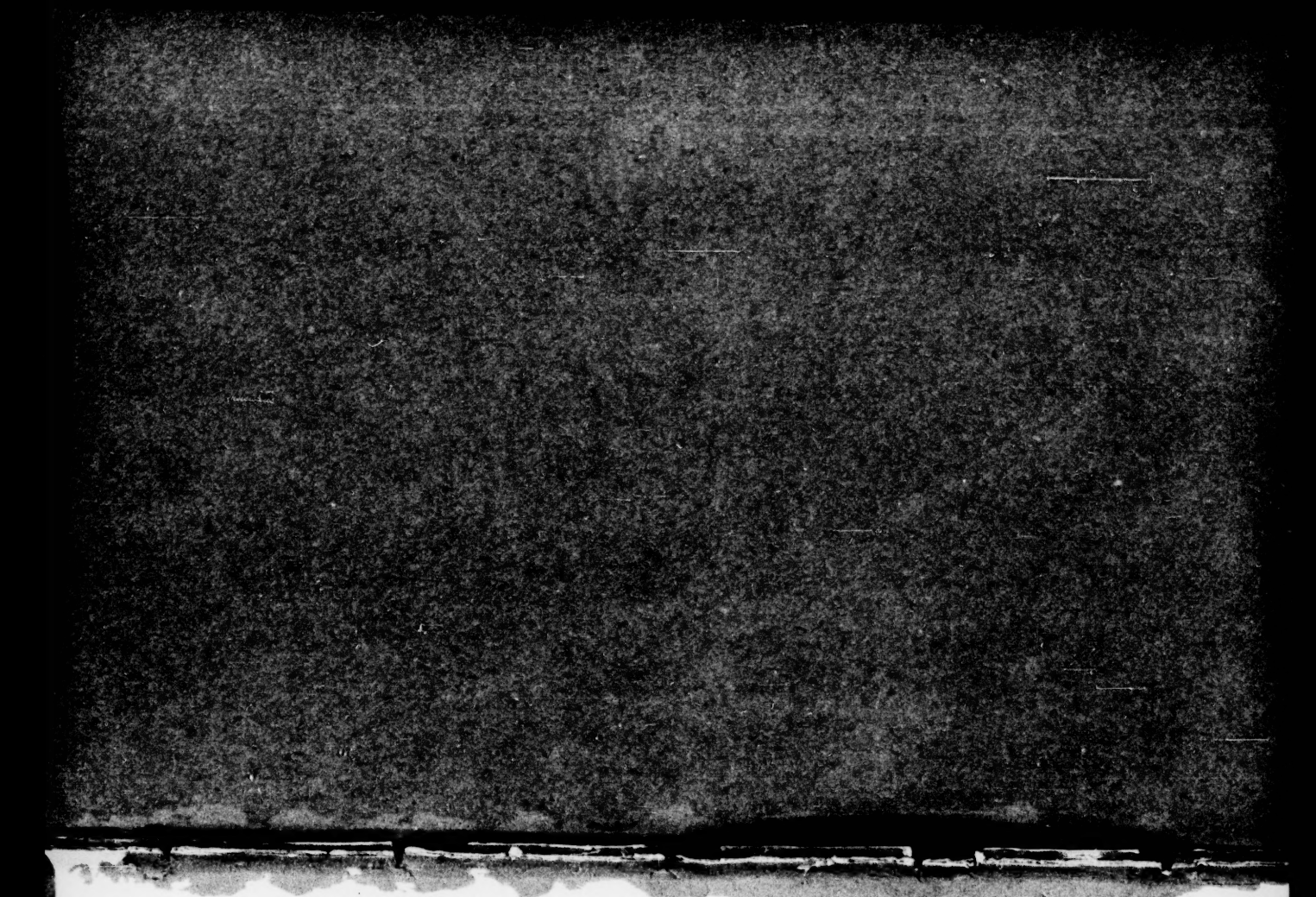
THE BARGE "ELDORADO," WELTHA A. SLYFIELD, OWNER, AND THE BARGE GEORGE W. WESLEY, CHARLES SONSSMITH ET AL., OWNERS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED DECEMBER 12, 1892.

(15,231.)

OPINION OF THE DISTRICT COURT.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 202.

THE PROPELLER "J. P. DONALDSON," ROBERT HOLLAND, CLAIMANT, APPELLANT,

vs.

THE BARGE "ELDORADO," WELTHA A. SLYFIELD, OWNER, AND THE BARGE GEORGE W. WESLEY, CHARLES SONSSMITH ET AL., OWNERS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

OPINION OF THE DISTRICT COURT.

BROWN, J. I will proceed to consider the several allegations of negligence charged against the master of the propeller.

1. In regard to the general course of the tow in leaving Buffalo. The usual and ordinary course up the lake from Buffalo to the
2 mouth of the Detroit river is W. by S. $\frac{3}{4}$ S., considerably to the northward of the course actually taken. This would carry the tow close to Long Point, and thence in a straight course to the narrow channel between Pointe Au Pelee and Pointe Au Pelee island. Had Captain Towle adopted this course, it is very probable that he could have taken shelter behind Long Point and weathered out the gale, as several other vessels did which left Buffalo about the same time. But the wind was from the S. E., the season was late, and the weather treacherous. By taking the course along the S. shore he could secure much smoother water, and would easily have been able to make the harbor of Erie, had not the wind kept canting to the westward and increasing in violence. There is some testimony tending to show that a S. E. wind at that season of the year frequently, but not invariably, changes to a gale from the S. W. or W.; but as the wind was light when the tow left Buffalo, I think it is demanding too much of the master to require him to forecast the weather for the following day. We have no right to expect in him greater weather wisdom than is found among the most experienced and scientific observers.

There is a great conflict of testimony as to the propriety of the course taken by the tow in leaving Buffalo. Some vessels which left on the same day took the northerly route and gained shelter behind Long Point. Others took the southerly route and made the harbor at Erie before the gale struck them. I think it is clearly one of those cases where the master might, in the exercise of sound judgment and reasonable discretion, have taken either course without being chargeable with negligence. His choice, of course, was largely dependent upon the season of the year, the state of the weather, the velocity of the wind, the probability of a storm, and the proximity of harbors of refuge, and we are not inclined to
3 review his judgment in that particular. The disaster which befel him undoubtedly tends to show that he made the wrong selection, but the propriety of his action must not be determined by the result. He can only be chargeable with negligence when he takes a course which good seamanship would deem unauthorized and reckless. "The owner of a vessel does not engage for the infallibility of the master, nor that he shall do in an emergency precisely what, after the event, others may think would have been the best." *The Hornet*, (*Lawrence vs. Minturn.*) 17 How. 100; *The Star of Hope*, 9 Wall, 230; *The W. E. Gladwish*, 17 Blatchf. 77, 82, 83; *The Mohawk*, 7 Ben. 139. *The Clematis*, 1 Brown, Adm. 499.

Libelants also claim in this connection that the propeller could either have crossed the lake and taken refuge under Long Point, or could have come about and returned to Buffalo as the master saw the storm approaching. I do not think he was bound to do this. So long as he could make his way against the wind he was as likely to make the harbor of Erie in safety as he was to make Long Point: indeed, it would seem, with the wind blowing a gale from the S. W., there would have been lack of good judgment in the master exposing himself to a beam wind and sea, by attempting to cross the lake. Whether he should attempt to turn about and make the harbor of Buffalo was also a question upon which he was at liberty to exercise his judgment. He deemed it a more prudent course to proceed directly to Erie, and I am by no means satisfied that he was not correct.

2. In not keeping further from the shore as the propeller approached Erie. It is charged in this connection that Capt. Towle was under the influence of liquor that afternoon, and left the deck at the time he was most needed, to a mate who had no knowledge of the shore at that point. There was no question made of Capt. Towle's general com-
4 petency, and I can see nothing to criticise in his management of the steamer after he took command. The charge of intoxication rests upon his admission that he drank in a saloon on the day he left Buffalo; that he had sent on board a jug of whisky as a part of the sea-stores which he kept in his room, and that there was an empty whisky bottle found on the floor the morning after the accident. Webster, the steward, who found the empty bottle, testified that the captain's appearance that night indicated to him that he had been drinking; that his eyes were red, and he looked stupid. But he says he saw nothing otherwise to indicate that he had been drinking, and that this appearance might have been owing to his facing the storm. This is also corroborated by the testimony of one or two others of the crew, who confessed to having quarreled with Capt. Towle. It is denied, not only by Capt. Towle himself, who swears that he drank nothing that day, and that there had been no whisky in the bottle for three months, but by all

the rest of the crew, who swear that they never saw or heard of his drinking too much while upon the propeller. It is pertinent in this connection to notice that the pleadings give no intimation that such an accusation was contemplated, nor was it suggested by the libelant in his testimony before the steam-boat inspectors at Port Huron, who inquired into the cause of the loss. Upon the whole, it does not seem to me that the offense has been proven. So grave a charge as this ought to be substantiated by something more than trifling incidents which are quite consistent with another theory, and the testimony of two or three disaffected men, contradicted, as it is, by nearly the entire crew.

The most serious question in the case is whether the propeller kept her tow as far away from the shore as she should have done under the circumstances. As I have already observed, I do not think the
5 master was bound to contemplate the contingency of turning about and going to Buffalo, or of crossing the lake under a beam wind and seeking shelter at Long Point, when he was already so near to Erie, but he was bound to keep far enough from shore to escape the danger of running upon the reef at that point as the wind and sea then were. Capt. Towle's watch ended at noon, but as the weather was heavy he remained on deck until 5 o'clock, when he left the propeller in charge of the mate, an experienced seaman, but not very familiar with the approach and entry to the harbor at Erie. Between 7 and 8 o'clock he came on deck again. The tow was then, as he claims, from a mile to a mile and a half from shore, with no indications of immediate peril. Libelants, however, claim that she had been allowed by the mate to drift to within a half a mile of the shore, and was nearer than was customary or safe for vessels in entering the harbor. There is a very considerable conflict of testimony upon this point. While I am disposed to give considerable weight to the testimony of Henry, the keeper of the light at the Beacon ranges; of Clark, who was in charge of the life-saving station; and of Pherrin, who lived about four miles from Erie and very close to the shore; at the same time it is entirely possible that their observations might have been made after the first squall had struck the tow and when she had undoubtedly gotten much to the southward of her proper course. The testimony of the crew of the propeller is substantially that she was kept upon the usual heading towards the Erie lights, and in the darkness and storm of that evening it must have been very difficult for those upon the tow to determine their distance from the shore. Libelant Slyfield admits he could not tell the distance. Upon the whole I do not think libelants have made out this branch of their case by a preponderance of testimony.

6 This includes all the charges of negligence which were urged upon the argument. In my opinion, the loss was occasioned by a peril of the sea. The disaster occurred during the prevalence of the worst storm of the season of 1880. All the ship-masters who were exposed to it united in pronouncing it a "living gale of wind," and one of the most sudden and violent within their memories. The report of the signal service filed characterized it as "a furious westerly gale; a thick, blinding snow storm." Such was its violence, at the very time the Donaldson was struggling off the shore, that the steamers which had taken refuge under Long Point were obliged to keep their engines working at full speed, and even then could not hold themselves up to their anchors, while at least one barge was lost there. In Erie harbor another

powerful steam-barge, during the same squall, had to let go her barges, because she could not hold them. With such weather as this in sheltered roadsteads, it is easy to conceive the peril to which the Donaldson with her tow was exposed in making their way along the open lake, with furious squalls driving them directly upon a lee shore. While the conduct of the tow may not have been above a searching criticism, we think it quite apparent that it would have been useless to contend against the furious squalls from the N. W.; and that the propeller cannot be justly held in fault for abandoning her tow and seeking safety where she could find it. Indeed, it was not claimed but that the abandonment, when actually made, was not necessary to save the propeller.

3. But it is urged by libelants that even if the propeller be exonerated from all charges of negligence in respect to the conduct of her tow upon that occasion, she is still liable for her proportion of the value of the lost barges, in general average,—that here was a common danger; a danger imminent and apparently inevitable, in which all partici-
7 pated; a voluntary jettison of the barges for the purpose of saving the propeller; or in other words, a transfer of the peril from the whole to a part of the tow; and that this attempt was successful; and therefore the propeller may be called upon for contribution. The proposition is a novel and interesting one. I know of no case in which it has even been discussed. Indeed, the very fact that no claim of this description has ever been made is worthy of suggestion as indicating the view generally taken by the profession. It is true there are in this case many of the elements which go to entitle the barges to a general average contribution, as stated in the leading case of *Barnard* v. *Adams*, 10 How. 270; still I know of no case wherein the principle of mutual contribution has been extended beyond the ship, her boats, tackle, apparel, furniture, and cargo. I understand the law of general average to be an outgrowth of the law-maritime as applied to the carriage of goods by sea. It is never applied to cases of a voluntary sacrifice of property upon land when made to preserve the property of others from a greater loss. For instance, if the house of A. be torn down, or is blown up in a conflagration, to save the houses of B., C., and D., A. has no right to contribution, be the evidence never so clear that the sacrifice was successful, and saved the property of B., C., and D., from destruction. Indeed, the cases have gone so far as to hold that the parties themselves who commit an act of depredation for the public safety are not liable in trespass. Says Judge DILLON, in his work upon Municipal Corporations, vol. 2, § 756:

"The rights of private property, sacred as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex.* Upon this principle, in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures in a city or compact town, to prevent the spreading of a destructive conflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains."

It was said, so long ago as the reign of Edward IV., that "by
8 common law every man may come upon my land for the 'defense of the realm.'"

In the *Saltpetre Case*, 12 Coke, 13, it is said that "for the commonwealth a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire; and the suburbs of a city in

time of war, for the common safety, shall be plucked down,—and a thing for the commonwealth every man may do without being liable to an action."

In *Mouse's Case*, Id. 63, certain passengers upon a ferry-boat from Gravesend to London cast overboard a hogshead of wine and other ponderous things to save the boat from being swamped in a violent tempest. It was held that as this was a case of necessity for the saving of the lives of the passengers, the defendant, being a passenger, was justified in casting the hogshead of the plaintiff out of the barge. See, also, *Governor, etc.*, v. *Meredith*, 4 Term R. 794; *Respublica* v. *Sparhawk*, 1 Dall. 357; *Taylor* v. *Plymouth*, 8 Metc. 462; *Mayor, etc.*, v. *Lord*, 17 Wend. 285; S. C. 18 Wend. 126. A like principle was applied in the Roman law, wherein it is said that if, by the force of the winds, a ship is driven against the cables of another, and the sailors cut these cables, no action will lie, if the ship cannot be extricated in any other way.

In the case of *The John Perkins*, 21 Law Rep. 87, Mr. Justice CURTIS decided a case which involved somewhat the same principle as the one under consideration. In this case one of the crew of a fishing schooner cut her cable in order to prevent a collision with another vessel and the destruction of both, and claimed a general average contribution for the loss of his cable and anchor. Judge CURTIS dismissed the libel, saying that, in his opinion, the only subjects bound to make contribution are

those which are united together in a common adventure and placed
9 under the charge of the master of the vessel, with authority to act in emergencies as the agent of all concerned, and which were relieved from a common peril by a voluntary sacrifice made of one of those subjects. The only opinion I have found to the contrary is that of Casaregis, an eminent civil law writer, who puts the case of the destruction of a vessel in port, lying near to another vessel which is on fire, to prevent the flames from spreading and being communicated to other vessels. He considers the compensation to the owner of the vessel thus destroyed as a proper subject of maritime contribution by the owners of the other vessels and cargoes which were saved from the impending peril. Disc. 46, No. 4563. I have found this opinion wholly irreconcilable with the opinion of Mr. Justice CURTIS above quoted.

From this review of authorities it is quite apparent that the doctrine of general average contribution arises from the peculiar relations existing between the ship and her cargo. Mr. Lowndes finds the underlying principle in the agency of the master to act for the owner of the cargo in cases of unforeseen danger. Lowndes, Av. 14-16. This would clearly have no application to the case of a vessel whose master remains in command of his own ship, and usually has no opportunity of conferring with the master of the tug in emergencies of this description. The master of the tug is in no sense the agent of the tow for any such purpose.

The difference between the relations of a ship to her cargo and those of a tug to its tow will not escape the observation of the most casual observer. Ordinarily, the master of the ship has but a single duty to perform, namely, the delivery of his cargo to the consignee; and for the time being, and for that purpose, the owner of the cargo yields possession and abdicates his authority to the master. For the performance of this duty

the master binds himself, his ship, and its owners by the most
10 stringent obligations of the law. His undertaking is absolute that his ship is seaworthy; that he and his crew are competent and

honest; that he will use due care in lading and unlading his cargo; that he will protect it from thieves; and will navigate his ship to her port of destination without unnecessary delay or deviation. Indeed, he is liable for every mishap to the cargo not attributable to the owner's fault, saving and excepting only the perils of the sea and the acts of public enemies. He cannot sell or hypothecate the cargo, except in case of urgent necessity, and not even then, without communication with the owner, if such communication be possible. Even if the vessel be wrecked, and his goods are cast upon the shore, neither he nor his crew are entitled to salvage for preserving them. Jones, Salv. 20.

On the other hand, if the cargo be once laden on board, the master has the right to carry it to its destination and detain it for payment of freight. Even if the voyage be temporarily interrupted or broken up, he has the right to tranship the cargo and forward it by another vessel. From the intimacy of their relations, from the common danger incident to their common adventure, and to prevent the master from sacrificing the cargo at the expense of the ship, there is attached the further anomalous feature that all sacrifices rendered necessary by the elements shall be borne mutually by the ship and cargo; whether the loss be occasioned by cutting away a mast or throwing overboard a bale of goods, it shall be borne by the owners of the ship and cargo in exact proportion to the value of their respective interests.

On the contrary, the obligations of the tug to her tow are discharged by the employment of reasonable care and skill. The master of the tug guaranties that she is seaworthy and properly equipped; that he will furnish the motive power and will use his best endeavors to take
11 his tow to the place of destination in safety. He does not, however, take charge of the ship except so far as may be necessary to direct her course. In all other respects the master and crew of the tow have entire control of her movements, and may adopt such independent measures for her perservation and safety as their own judgment may dictate. He does not insure the ship against anything but the consequences of his own negligence, nor her cargo from the depredations of thieves or the barratry of the crew. If the performance of his contract be interrupted by any unforseen or extraordinary peril not within the contemplation of the parties, such as the slipping or breaking of a line in a heavy sea, he is at liberty to treat the original contract at an end; and while he has no right to abandon his tow except to save his own vessel, he may recover salvage as if he were a stranger, if he has put his own vessel in peril to rescue her. *The Saratoga*, Lush. 318; *The Robert Dixon*, 4 Prob. Div. 121; S. C. 5 Prob. Div. 54; *Roff* v. *Wass*. 2 Sawy. 389; *The J. C. Potter*, 3 Mar. Law Cas. 506.

As observed by Lord KINGSDOWN, in delivering the opinion of the privy council in the case of *The Minnehaha*, Lush. 335, 347.:

"She may be prevented from fulfilling her contract by a *vis major*, by accidents which were not contemplated, and which may render the fulfillment of her contract impossible, and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if, in the discharge of his task, by sudden violence of the wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which are not within the scope of her original engagement,

she is entitled to additional remuneration for the additional services if she be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage."

The rule is the same with respect to pilots. *The Eolus*, 1 Asp. Mar. Law Cas. 516, and note; *The Hope*, (*Hobart* v. *Drogan*,) 10 Pet. 108; *Akerblom* v. *Price*, 4 Asp. Mar. Law Cas. 441; *The Wave*, Blatchf. & H. 235.

It is not claimed that the distinctions here taken are decisive against the allowance of a general average contribution in cases like these. They do, however, show that the whole law upon this subject has arisen out of the anomalous relations between the ship and cargo—relations such as do not exist between a tug and tow. In my opinion, the law of general average is confined to those cases wherein a voluntary sacrifice is made of some portion of the ship or cargo for the benefit of the residue, and that it has no application to a contract of towage.

A decree will be entered dismissing the libels, with costs.

167-599

Supreme Court U. S.
FILED.
DEC 9 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. ~~202~~. 29,

THE PROPELLER "J. P. DONALDSON," ROBERT HOLLAND, CLAIMANT,
Appellant,

vs.

THE BARGE "ELDORADO," WELTHA A. SLYFIELD, OWNER, AND THE BARGE GEORGE W. WESLEY, CHARLES SONSSMITH, ET AL., OWNERS.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Filed December 12, 1892.
(15,231.)

Brief for Claimant and Appellant.

FRANCIS J. WING,
S. H. HOLDING,
of Counsel.

HARVEY D. GOULDER,
Proctor.

THE FORMAN-BASSETT-HATCH CO., CLEVELAND.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 202.

THE PROPELLER "J. P. DONALDSON," ROBERT HOLLAND, CLAIMANT, Appellant,

vs.

THE BARGE "ELDORADO," WELTHA A. SLYFIELD, OWNER, AND THE BARGE GEORGE W. WESLEY, CHARLES SONS-SMITH, ET AL., OWNERS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANTS.

This case presents a novel and interesting question in the law of General Average. Its very novelty is a strong argument against the claim, which arises under the circumstances as shown in the statement of the question certified up :

"The J. P. Donaldson was towing the said barges Eldorado and Geo. W. Wesley from Buffalo, New York,

to Bay City, Michigan, having no other connection with them than that she was to tow them and to receive for her services a portion of freight which the said barges would earn on the trip according to the custom and usage which prevails upon the great lakes. By a violent storm and without negligence on the part of the J. P. Donaldson she, with her tow, were driven on a lee shore, and all were in imminent, if not certain, peril of being blown ashore and lost. The Donaldson struggled against the storm to the last moment she could with safety to herself, and then, in order to prevent her from going ashore and being lost, her master, after first giving notice with her steam whistle of his intention to do so and without negligence on his part, cut the tow-line connecting said barges to her, and the said barges were driven on shore and were wrecked and lost, and the Donaldson, by reason of being thus disencumbered of her tow, was enabled to reach a port of safety.

The question arising in said causes as to the right of the owners of said barges to recover for their loss against the said propeller, J. P. Donaldson, upon the principles of general average, and whether the law of general average contribution is applicable in such cases, being one in respect to which this court desires the instruction of the Supreme Court, it is therefore—

Ordered that the question as to the right of said owners and appellees to recover for a general average contribution be, and the same is hereby certified to the Supreme Court of the United States, and the instruction of the Supreme Court on said question is respectfully requested; and it is further ordered that a copy hereof, and also a copy of the pleadings and of the decrees and the opinions of the said district and the said circuit courts, be transmitted to the clerk of the Supreme Court of the United States, duly certified by the clerk of this court, under the seal thereof."

The libels were for damages for negligent towage, libelants' claim being that the Donaldson abandoned her tow and left them when it was her duty to have remained by them.

This branch of the case was closely contested in the District Court, before the present Justice Brown, and on appeal in the Circuit Court before the late Justice Matthews. Her abandonment of the tow was justified; it was held that the steamer was bound to bring to the performance of this contract of towage nothing more than ordinary care and skill, and had the right to terminate the contract of towage under the circumstances of danger in which they were placed; Justice Matthews saying: (Record p. 26, fol. 42.)

"The loss of the barges under the circumstances must be regarded as resulting from the perils of navigation, and for which under the contract of towage the propeller cannot be held responsible. It is not necessary to recapitulate the proofs in support of this conclusion. They are fully stated, with the reasons justifying it, in the opinion of the learned judge of the district court, as reported in 19 Fed. Rep., 264, in which, upon this part of the case, I fully concur."

At some intermediate stage of the proceedings, under the prayer for general relief, the claim was urged that, although the steamer was justified under her contract of towage in casting off the barges, and consequently was not liable for a breach of her towage contract, yet she was liable for her proportion of the value of the lost barges in general average.

On this branch of the case the opinion of the District Judge reported in 19 Fed. Rep., 264, denying the claim for contribution, is to the effect: That while the reciprocal obligation in general average may not, strictly speaking,

arise out of a contract of affreightment, yet it is one of the incidents which, from the beginning, has attached to the carriage of goods by sea; that it must be in principle, and always has been in practice, confined to a single ship, her cargo and freight list; that it has no application on land, though the circumstances may be never so closely analogous; and that, aside from universal practice, it is inherently inapplicable except as between a ship and her own cargo, when, from the necessity of a particular case, the master, without losing his character as agent for the ship, becomes also the representative for the occasion of each shipper of cargo on board, clothed with full authority and charged with the duty, in that capacity, to make selection of property for sacrifice and bind the remainder to make due contribution; that the relation of steamer to tow is one of contract, calling for the exercise of nothing more than ordinary skill and care, which, when performance becomes, without fault of the steamer, impossible or extremely dangerous for the steamer, terminates, without investing the master with any non-contractual rights or duties such as lie at the foundation of general average rights between ship and cargo.

Mr. Justice Matthews in his opinion, without going the length of holding that the doctrine of general average can be extended to all cases of towage, and by some oversight assuming, inaccurately as will be shown *infra* p. 19, that the tows were incapable of taking care of

themselves, held that, because the compensation in this case was a fixed proportion of the gross freight and the towage was for an entire trip, an association sprung up between the different vessels and the towing steamer substantially identical with that arising between ship and cargo ; and that a case was presented for general average contribution,—a conclusion the correctness of which the learned Justice himself subsequently doubted as will be shown.

Each held with the other that without such association general average contribution would be out of the question ; each intended to follow the doctrine laid down in the case of The John Perkins, 21 Law Rep., 87. Justice Matthews quoting from the opinion in that case :

"The ancient as well as the modern code of sea laws proceeds upon the assumption that the master, representing all the aggregate interests by holding the office, has the rightful power to judge upon the sacrifice of one of the interests which he thus represented for the benefit of the others, but they afford no ground for the position that he may judge for mere strangers whose property has not been confided to his care. In my opinion the only subjects bound to make contribution are those which are united together in a common adventure and placed under the charge of the master of the vessel with the authority to act in emergencies as the agent of all concerned and which are relieved from a common peril by a voluntary sacrifice made of one of those subjects."

The relation existing between ship and cargo, and of the master to both, become then the first subject of inquiry. Then must be considered the relation of a steamer

and her master to the tows, which, in this case were staunch craft fitted out with masts, sails, gear, anchors, etc., and were towed upon long lines, each barge being in the immediate possession and control of her officers and crew, and each having her own master on board charged with the duties and clothed with the authority of that relation as to his own ship and cargo.

To review generally the authorities is made unnecessary by the extended consideration given to them in

Ralli vs. Troop, 157 U. S., 393,

which case, as we will contend, disposes of the present case adversely to the claim for general average contribution.

These important conclusions are reached in that case:

1. "In the courts of England and America, general average has not been restricted to the cases put by way of illustration in the Rhodian and Roman laws; *but it has never been extended beyond the spirit and principle of those laws.*" (p. 394).

2. "As the right to general average may be considered as resting not merely on implied contract between the parties to the common adventure, but rather on the established law of the sea, in the light of and subject to which all owners of ships and cargoes undertake maritime adventures, so the authority of the master may be treated as resting either on implied contract of the parties, or on the duty imposed upon him by the law, as incident to his station and office, to meet the necessity created by an emergency which could not be foreseen or provided for, *and to prevent the property in his custody and control from being left without protection and care.*" (p. 397).

If we treat the authority of the master and the right to general average contribution as arising upon the implied agreement of the parties to the contract of affreightment, there is an end of the contention for general average contribution in this case.

Treating these rights as dependent "rather on the established law of the sea, in the light of and subject to which all owners and shippers of cargo undertake maritime adventures," it is significant that the law of the sea, until this decision, furnishes no case where the doctrine of general average is applied as between a steamer and tow, under any circumstances whatever; that since the publication of this opinion it has not been adopted in any other case; and most of all is it significant that the late Mr. Justice Jackson in citing and commenting on this case in The Chickasaw, 41 Fed. 638, should have been able to say:

"So that the present case could not fall within the enlarged principle of general average contribution announced by Mr. Justice Matthews in the J. P. Donaldson, 21 Fed. Rep., 671, *the correctness of which the writer personally knows that Mr. Justice Matthews subsequently doubted.*"

It is true that the novelty of a claim may not refute its soundness; but when it is considered that for more than sixty years vessels have been towed, and towage has been a recognized title in admiralty law; that the statement of the question certified shows that at the time of this occurrence the *custom* on the lakes was for the

steamer to charge a fixed proportion of the gross freight of the vessels towed, it is much against a claim founded upon the *established law* of the sea that not another instance can be found in which the doctrine of general average has been extended to such a case.

In 1833, in deciding a case which arose in 1828, Chief Justice Shaw spoke of towing as "the trade of towing;" and also as "an open, public and distinct branch of navigation."

Sproul vs. Hemingway, 14 Pick., 6.

See also

Alexander vs. Greene, 3 Hill, 10.

The Express, 1 Blatch, 363.

The John Frazer, 21 How., 393.

Sturgis vs. Boyer, 24 How., 321.

The Duke of Sussex, 1 W. Rob., 270.

The Duke of Manchester, 2 W. Rob., 470.

All these are cases decided between 1830 and 1860. Each refers to towing as "a business," an "extensive business," a "usage of the trade," and all define the relation of the tug to the tow and their respective duties and responsibilities.

As to towing on the Lakes, where the custom to charge a portion of the barge's freight obtains, as long ago as 1874 Judge Longyear said that this had come to

constitute one of the great interests of navigation, particularly upon the lakes and their connecting waters.

The Clematis, 1 Brown, 199.

We here simply call to the mind of the court the fact that the relations of ship and cargo, and of steamer and tow have been before the courts in many cases; have been discussed, considered and construed until the law has for many years been established, and they have always been regarded as standing on different principles.

The argument divides itself into the following points:

1. The relation between ship and cargo and the master's authority.

2. The relation between steamer and tow and the master's authority.

3. Does the method of fixing compensation in this case change the relation?

4. May the doctrine of general average be extended beyond a single ship and her cargo?

5. There was no general average sacrifice.

   a. The master of the steamer was without authority to make selection.

   b. The barges went ashore at the time and place, and in the manner they would, had the tow line not been cut.

I. THE RELATION BETWEEN SHIP AND CARGO AND THE MASTER'S AUTHORITY.

Molloy, in his work De Jure Maritimo, Vol. I, Book II, Chap. II, Sec. I, says:

"A Master of a Ship is more than one, who, for his knowledge in *Navigation*, fidelity and discretion, hath the Government of the Ship committed to his care and management; and by the *Common Law* (by which Properties are to be guided), he hath no Property either general or special, by the constituting of him a Master; yet the Law looks upon him as an *Officer*, who must render and give an account for the whole charge, when once committed to his care and custody; and upon failure to render satisfaction."

In the next section, after discussing the subject of jurisdiction, he continues:

"And therefore so soon as Merchandizes and other Commodities are put aboard the Ship, whether she be riding in Port, Haven, or any other part of the Seas, he that is *Exercitor Navis* is chargeable therewith; and if the same be there lost or purloined, or sustain any damage, hurt or loss, whether in the Haven or Port before, or upon the Seas after she is in her Voyage, whether it be by Mariners, or by any other through their permission, he that is *Exercitor Navis* must answer the damage, for that the very lading of the Goods aboard the Ship does subject the Master to answer the same."

Again, in the same section, after stating a case in which the defense of the master was that certain persons, pretending to be press masters, entered the ship and robbed her of goods, without fault on his part because he had a sufficient guard and the goods were locked up

under hatches and were taken by force, and that he could not have prevented the same, and that he had no share in the ship but was a servant acting for a salary, the author says :

"But notwithstanding it was adjudged for the Plaintiff, for at his peril he must see that all things be forthcoming that are delivered to him, let what accident soever happen ; (the act of God, or an Enemy, perils and dangers of the Seas only excepted) but for Fire, Thieves and the like, he must answer, and is in the nature of a Common Carrier ; and that though he receives a Salary, yet he is a known and publick Officer, and one that the Law looks upon to answer, and the Plaintiff hath his Election to charge either Master or Owners, or both at his pleasure, but can have but one Satisfaction."

Carver, in his work on Carriage by Sea, devotes the first chapter to a consideration of the obligations of the carrier by water. His conclusions are, that whether a ship be put up as a general ship, whether she ply regularly between fixed *termini*, or whether she engage for a single person at a time, and whether she or her owner or master be strictly called a common carrier or not, there is nevertheless the same liability for the safety of the goods as in the case of a common carrier.

Best, C. J., in Riley vs. Horne, 5 Bing. 217-220, places this special liability on these grounds :

"When goods are delivered to a carrier, they are usually no longer under the eye of the owner ; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the

owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward, namely that, of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not—namely, the act of God and the king's enemies."

The following lengthy extract is made from a leading case which received the sanction of this court in Ralli vs. Troop, *supra*.

The Gratitudine, 3 C. Rob. 240-257:

"In the course of the discussion, however, the argument has been carried to the entire extent, and it has been contended, that the master has no right to bind the owners of the cargo in any case—upon this ground, that although he is the agent and representative of the ship, and by virtue of that relation may bind the ship and its owners, he is not the agent of the proprietors of the cargo, and therefore cannot bind it. It is said that he is the mere depositary and common carrier, as to the cargo, and that the whole of his relation to the goods is limited to the duties and authorities of safe custody and conveyance. This position, that, in no case has he a right to bind the owners of the cargo, is, I think, not tenable to the extent in which it has been thrown out; for though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be sup-

posed to mean that valuable property in his hand is to be left without protection and care. It must unavoidably be admitted, that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of a voyage at sea, as in intermediate ports, into which he may be compelled to enter.

The case of throwing overboard parts of a cargo at sea is of that kind. Nothing can be better settled than that the master has a right to exercise this power in case of imminent danger. He may select what articles he pleases; he may determine what quantity; no proportion is limited; a fourth, a moiety, three-fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it never can be maintained that he might not throw the whole cargo overboard. The only obligation will be, that the ship should contribute its average proportion. It is said this power of throwing over the whole cannot be, but in cases of extreme danger, which sweeps all ordinary rules before it; and so it is. So, likewise, with respect to any proportion, he can be justified only by that necessity; nothing short of that will do. The mere convenience of better sailing, or more commodious stowage, will not justify him to throw overboard the smallest part. It must be a necessity of the same species, though perhaps differing in the degree.

Another case is that of ransom; in which, it is well known, that by the general maritime law, a master could bind by his contract the whole cargo, as well as the ship. He could not go beyond the value of the goods, but up to the last farthing of their entire value there is not a doubt but he might bind the cargo as well as the vessel. A very modern regulation of our own private law, founded on certain purposes of policy, has put an end to our practice of ransoming, but I am speaking of the general maritime law and practice, not superseded by private and positive regulation.

These are instances of authority at sea. There are other cases also in port, in which the master has the same authority forced upon him. Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor;

suppose the vessel, unable to proceed, or to stand in need of repairs to enable her to proceed in time. In such emergencies the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law that the cargo should be left to perish without care."

It is needless to multiply authorities on this point before a court which has had occasion to deal with the question so often, and those cited are but for the purpose of bringing to the mind of the court afresh, the groundwork and basis of the relation which the law has established between ship and cargo, and of the authority of the master to represent the owners of the cargo *as their agent* arising from necessity, in which capacity and by virtue of which representative authority he binds them by his general average act, so that, while much must be left to the discretion of the master, still, if it appear that the necessity did not exist, the consequences of the act would fall upon the master himself or upon the shipowner, whose agent he is at all times.

If there is another alternative besides the one selected by the master, then that loss is not so proximate as to call into operation the law which places the whole expedition in his discretion, and clothes his exercise thereof with *its* authority.

Maclachlan on shipping, (3 ed) 664.

The point may be fairly summed up: When danger and disaster threaten the ship, cargo and crew, the master stands as the representative of the shipowner, and of

each cargo owner, with full authority, but charged with the duty of doing what a prudent owner of the whole would do; that is, to make reasonably wise selection of a part to be sacrificed, choosing such part of the property under his dominion as in his judgment may be best, whether of the ship or of the cargo; and pledging, with full authority, what remains to contribute to the loss resulting from such selection. It is this complete but responsible authority and charge over the whole which unifies the ship, cargo and crew, under one head, into the common or associated adventure, under circumstances of danger and disaster.

II. THE RELATION BETWEEN THE STEAMER AND TOW AND THE MASTER'S AUTHORITY.

The law has long been established that a steamer is not a common carrier or an insurer of her tow, and that the law of these relations has no application to a steamer and tow. The uniform measure of liability requires of each the exercise of ordinary care and skill in the performance of the contract, and nothing more.

The Webb, 14 Wall., 406.

The Margaret, 94 U. S., 494.

Transportation Co. vs. Hope, 95 U. S., 297.

The Burlington, 137 U. S., 386.

For the purpose of observing the rules of navigation they have been held to constitute one vessel under steam.

The Civilta, 103 U. S., 699.

But we are aware of no authority which constitutes them one vessel for any other purpose, or even then except as to third parties; as between themselves they are separate and independent vessels and, "where the controversy is between the owners of the steam tug and the owners of the tow, it is clear that the owners of the former are not liable if the disaster was occasioned by the fault or misconduct of those in charge of the other vessel."

The Express, 3 Cliff., 402.

The master of the barge is charged with duties respecting even the immediate navigation, and cannot shield himself behind an order from the tug when "the danger was so imminent that common sense and common prudence admonished him to postpone obeying the order."

The J. H. DeGraff, 66 Fed., 351-353.

This court said in

The Maria Martin, 12 Wall., 31-44:

"Where the officers and crew of the tow, as well as the officers and crew of the tug, participate in the navigation of the vessels, and a collision with another vessel ensues, the tug alone, or the tow alone, or both jointly may be liable for the consequences according to the circumstances, as the one or the other or both jointly, were either deficient in skill or were culpably inattentive or negligent in the performance of their duties."

There is no possession or control of the barge by the steamer further than is necessary to enable it to carry out the contract of towage. This subject was considered in Transportation Co. vs. Hope, 95 U. S., 297–300, the court saying:

"The transportation company did not occupy the position of a common carrier, and did not have that exclusive control of the barge which that relation would imply. It did not employ or pay the master and the men in charge of her, nor did it exercise that internal control of her cargo, its stowage, its protection and the like, which belonged to a bailee, and it was not bound to the extraordinary duties and liabilities of a common carrier. (Alexander vs. Greene, 3 Hill., 9.)

"It is, however, impossible to admit the proposition that the barge remained in the exclusive possession, control and care of her owners; that is, that the transporter had not and could not take any, the slightest, care of her, and was not permitted to exercise the slightest control over her, and had no possession of her of any sort or character.

"She could not be towed except by being taken in charge by the tug; that is, under its care and control and management. When the master of a tug undertakes to transport a barge, he must apply the means for that purpose. He must furnish motive power not only, but he must direct her location; whether on the port side or the starboard side; whether she shall be the inside boat or the outside one; when and how she shall be lashed to other boats; with what fastenings she shall be secured as she is dragged through the water; whether she shall go fast or slow; when, if at all, she shall drop astern, when she shall go to harbor; how long remain there, and what shall be her course of navigation. These tows consist at times of thirty or forty boats; and they must all be under one head, and subject to one judgment, which is that of the transporter. Whether this judgment was carefully and skillfully exercised in this case formed the ques-

tion which was passed upon by the jury. It is extremely inaccurate to say that one who does, and who must do, all these things is not, while doing them, in the exercise of the slightest possession or care or control of such vessel. The charge of the judge, on the contrary, that the transporter had the supreme control of the barge *so far as it was necessary to enable it to fulfill its contract to tow the barge*, was correct."

The steamer or her master does not become the agent of the tow in any sense. In a case where the tow was lashed alongside and there was no one on the tow participating in the navigation, which is the closest association imaginable between steamer and tow, this court decided that there was no agency.

Sturgis vs. Boyer, 24 How., 110-123, the court saying:

"By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, or ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract is negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation."

When by reason of a storm the steamer is unable to further continue the performance of the towage contract

without too serious danger to herself, she is at liberty to abandon it, and, by shipwreck of her tows, is relieved from obligation under the towage contract.

It is, perhaps, unnecessary to go outside of our present case for authority for this proposition since this was distinctly the holding of Mr. Justice Brown, 19 Fed. Rep., 271, in which Mr. Justice Matthews fully concurred. (Rec. 26, fol. 42.)

The legal connection and relation is completely sundered also when the danger involves the tow alone, and the steamer, without fault, casts off the line.

The John Nicol, 03 Fed. Rep. 275 (6th C. C. A.)

A slight embarassment arises from the fact that while the District Court considered the tows in this case, one of which was partially laden with cargo, as being in the immediate command and under the immediate direction and control, each of its own master and crew, the Circuit Court says (Rec. 35, fol. 59.):

"in regard to craft, such as the barges which constituted the tow, it cannot be supposed that it was contemplated by the parties that in any emergency they could take care of themselves."

We are relieved from this embarassment by examination of the libels, which are before the court, on pages 3 and 7 of the record. The first one, filed by the owners of the Wesley, states as follows in article second:

"That on the nineteenth day of November, A. D., 1880, the said schooner barge, being then and also at the

time of the loss and damage hereinafter mentioned tight, strong, staunch and in every respect well manned, tackled, appareled and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts and upon the lookout for the protection and safety of said vessel, was bound on a voyage from the port of Buffalo, in the State of New York, to the port of Saginaw, in the State of Michigan."

And in article third, after showing that the three barges were in tow of the propeller J. P. Donaldson, the Bay City first, the "schooner" Wesley second and the Eldorado third in tow, the libel proceeds to show that said "schooner" during the night, and until about three o'clock in the morning, carried her mainsail, foresail and staysail, which were taken in at about three o'clock in the morning because the wind had come so much ahead that they would not draw; that before the stranding they received a signal from the propeller to the vessels in tow to get their anchors ready; that soon thereafter the line of the Bay City was cut or cast off, the anchors of the said schooner (Wesley) were at once thrown and that she drifted ashore, dragging both her anchors.

In the libel filed by the owners of the Eldorado, the second article is substantially the same as article second quoted from the Wesley libel. This libel does not state that any sails were carried by the Eldorado on this occasion, but it does state that after the signal was given to let go their anchors, those on board got the anchors ready to throw, but, for reasons stated, *her master delayed a*

little to throw the anchor; that the master and crew on the barge were compelled to leave her that night for safety; that they returned the next day and proceeded to strip her, and save all that could be saved of her *sails, rigging, etc.*

It therefore sufficiently appears from so much of the proceedings as are before the court, that these vessels were fitted out with rigging, sails, anchors and gear, and were in charge each of a master and crew actively upon the lookout for their navigation and safety, and that they were being towed in single file upon long lines.

The relation between tug and tow was recently well stated by the Circuit Court of Appeals for the 5th Circuit, as follows:

"In every contract of towage there is implied an engagement that each party, their agents and servants, will perform his duty in completing the contract; that proper skill and diligence will be used on board both the vessel towed and the tug; and that neither, by negligence or by mismanagement, will unnecessarily imperil the other, or increase any risk incidental to the service undertaken. News. Salv. p. 136; Macl. Shipp. p. 293; The Julia, 14 Moore, P. C. 210; The Express, 3 Cliff., 462. Tugs, when taking other vessels in tow, are bound to use ordinary care and diligence in taking up and managing the tow according to the exigencies of the business. They have the full government and care of the vessel towed. The Quickstep, 9 Wall. 670. They cannot abandon the safety of interests intrusted to them for slight causes; or on account of even ordinary obstacles, and excuse themselves. The causes must be ample, and the obstacles in the way of performance must be at least of an extraordinary character, if not absolutely insur-

mountable. The Clematis, 1 Brown Adm., 499. But the law does not imply a warranty that the tug will tow the vessel to her destination at all hazards, but merely an engagement on the part of the tug to use competent skill, and best endeavors to perform the service. She is relieved from her obligation if she be prevented by accident or circumstances of difficulty, not contemplated, which render performance of her contract impossible. Macl. Shipp. 293-294."

The W. J. Keyser, 13 U. S. App., 480.

The circumstances under which the towage service is rendered must measure the requirements of ordinary care for each particular case, but ordinary care and skill in the performance of the contract, is all that is required in any event.

It is a contract relation well defined, the law imposing no peculiar rights, powers or duties further than the ordinary duties arising out of the contract — to bring to its performance reasonable care and skill, so that when the further performance of the contract becomes impossible in the manner contemplated, she is at liberty to terminate the contract, and thereafter stands as a stranger to the tow, to the extent that she may earn and receive salvage compensation.

And herein lies a distinction. The cargo of the ship passes into the immediate possession and control of the *magister navis* for the purposes of the transportation, and, until a common danger arises, he is a stranger to the cargo except for the purpose of custody and conveyance; but

when that danger threatens, he is at once invested with authority and charged with duties and responsibilities in respect to the cargo, as the direct representative of the owners thereof. So long as ordinary conditions obtain the contract of affreightment defines his authority in respect to cargo; when the danger arises, the established law of the sea continues his relation to cargo by creating new and higher duties and rights of custody, control and disposition arising out of, and dependent upon, that danger.

In like manner the contract of towage, calling only for the exercise of ordinary care and skill, defines the duty of the towing steamer and her master; but when the danger arises which makes it impossible or unduly perilous for the steamer to further prosecute the contract, then, instead of continuing the relation with new duties and obligations, conferred upon the master of the steamer by that danger, the established law of the sea makes him a stranger to the tow.

The danger which creates the association of principal and agent between the master of a ship and his cargo owner, disassociates the steamer from her tow. Dealing with a question of towage, we look to the contract in order to determine the rights of the parties thereunder; in relation to ship and cargo, we look to the law of the sea.

It seems therefore to be the established law of the sea that a steamer is not a common carrier or an insurer of her tow, and that the law of those relations has no application whatever; that the steamer has possession only of a kind, and so far as necessary to the performance of her contract of towage, a possession under and governed by that contract; that even where it is necessary for the tug to take complete possession in order to perform her towage contract, there is no relation of agency; that where, as in this case, the vessels are towed upon long lines and each is furnished with sails, gear, rigging, anchors, etc., with her own master and crew on board, participating in the navigation, there is a divided responsibility even as to their navigation; while as to the internal affairs of each ship her cargo and crew, each master is supreme; that the steamer is liable only for the exercise of ordinary care and skill, and, when the performance of the towage contract as contemplated becomes no longer possible or is attended with such serious danger to the steamer as the facts in this case present, the law terminates the contract so completely that they become strangers.

By contrast with the relation between ship and cargo, wherein, when danger supervenes, the law imposes high representative authority and duty upon the master as to his cargo, in the case of towage, when danger supervenes and the contract is terminated, this

occurs not because the contract obligation is supplanted or superseded by higher duties and new responsibilities toward the tow, but because, all the obligations arise from and rest in the contract, and the termination of the contract terminates the relation entirely and leaves them strangers.

This is a distinction arising from the vital difference in the principles applicable to the two relations.

III. DOES THE METHOD OF FIXING THE COMPENSATION IN THIS CASE CHANGE THE RELATION?

We have already seen from the libels what character of vessels these were; that they were fitted out with rigging, sails, etc., and had their masters and crews on board who took part in the navigation, and that they were towed astern upon lines.

It appears that the steamer was to receive a fixed proportion of the gross freight as compensation for the towage service, which was a customary method on the lakes.

Can the method of fixing the compensation so change the relation between the steamer and these vessels, and the cargo of the one which was partially laden, that the principle of general average would apply between them?

It need not be argued that as to the ordinary obligations of the towage contract there was no difference, since both the courts whose decisions are under review concurred in this, and exonerated the steamer from all fault or liability on account of casting off the tow line, when and as she did.

The principal object in fixing compensation in this manner evidently is to regulate the price of towing by the size of the vessel. It also furnishes a simple method of providing a higher price when freights are remunerative and a more moderate price when freights are low.

No relation, by contract or otherwise, is created between the steamer and the cargoes carried on the vessels in tow; the owner of the steamer has no lien upon those cargoes for the towage price; the owner of the cargo pays no portion of the tow bill and comes under no obligation in respect to it; he could not be sued by the owner of the steamer, and could not himself sue the steamer, her master or owner for a breach of the contract in any respect; no privity is created between the owner of cargo and the steamer or her owner or master; the towing steamer remains as absolutely a stranger to the cargo of the tow as if the price were *per diem* compensation, or a fixed sum.

As between the parties to the towing contract, the towing steamer takes no risk of their gain or loss on the trip; it is quite immaterial whether it be profitable to the

tow or not; in any event, upon due completion of her contract, she is entitled to receive a fixed proportion of the gross freight.

It does not even constitute the parties to the contract partners. The steamer or her owner takes no interest in the expenses or losses of the tow or in the question of her profits; has no direction as to what cargo shall be taken or the rate of freight, or the disposition of the freight money; has no interest in the freight money until it has been paid over to the owner of the tow; would have a claim against the barge and her owner for towage upon the due performance of the contract, irrespective of whether the barge ever collected the freight or not, which claim the steamboat owner could enforce, and does enforce, in court, as readily as where the compensation is measured in any other manner.

It may be said that the steamer would have no compensation if the tow did not earn freight, but that is only to say that her contract is an entire one, and that her compensation depends upon full performance; and that the steamer in making that kind of a contract takes upon herself, so far, the risk that the voyage will be made successfully.

It is difficult also to see how the simple method agreed upon in a towage contract for fixing the price can alter the law that the cargo of a steamer is, at all times, a stranger to the tows and to any cargo they may have on

board; or how it can alter the law that the steamer, when the point arrives where she may without fault abandon her tow, abandons with it the towage contract and the right to compensation under it, and becomes a stranger to the tow.

We submit that the term of the contract, the purpose of which is to fix the measure of compensation, does not enlarge the power of the master of the steamer over the tow or cargo on board thereof, or bring the vessels in any closer association. It does not constitute him *magister navis* of each vessel in tow, or give him the right, in time of danger, to usurp absolute authority over another ship and her cargo, then in charge of a competent master, on whom the established law casts the same rights and duties, as to that ship and cargo, as govern the relation of the master of the steamer to his ship and cargo.

IV. MAY THE DOCTRINE OF GENERAL AVERAGE BE EXTENDED BEYOND A SINGLE SHIP AND HER CARGO?

It will be conceded that the general average right sprung up between a ship and her own cargo centuries before the practice of towing was possible; that, preeminently, it is a right between a ship and her cargo on board. If this doctrine is to be extended to embrace

cases of towage, it would amount to the extinction of the old principle, or at least to such an extension as will not leave it within "the spirit and purpose" of the Rhodian and Roman laws.

Where vessels are loaded the cargoes must be considered in dealing with any question of general average, and it is difficult to conceive of any basis for the right of contribution between the cargo of a steamer and the cargo of her tow, or between either vessel and the cargo of the other.

The fact that a vessel is without cargo on the happening of some disaster does not vary the principle. It is sometimes said that where there is no cargo there can be, strictly speaking, no general average, but, in such cases charges are incurred and treated as in the nature of general average, and charged on ship alone not because the principle is different, but because there is no other interest at risk.

The proposition under argument was very forcefully presented in the opinion of Mr. Justice Brown in the original case, and the authorities collated in the opinion by Mr. Justice Gray in Ralli vs. Troop at p. 394, seem to lead to no other conclusion.

The doctrine of general average is said to apply to "associated interests," "interests embarked in a common adventure;" but, whenever the authorities have undertaken to specify what those interests are, they are con-

fined to a ship and her own cargo. This is doubtless because this community of interest must be confined to property interests which, undergoing exposure in like manner and in like measure, come under the sole charge of one officer as the *then* fully authorized agent of all.

In one of the cases quoted Mr. Justice Story takes as the first requisite "that the ship and cargo should be placed in a common imminent peril;" Mr. Justice Grier "a danger in which ship, cargo and crew all participate;" Lord Justice Bowen, refers to it as "applicable between those who place their cargo on board a ship and the ship owner;" and Mr. Justice Curtis seems to make the same restriction.

The associated interests between which the right of contribution exists, according to these cases, and they are leading cases establishing the law, are those which come under the control of the master *as master*. Each of the cases distinctly refers his right make a general average selection, to his office and representative authority over what is sacrificed and what remains, to sacrifice the one, and bind the other to contribution. Less than this paramount and undivided authority over all the interests is not enough, so that this court (p. 400) summing up the result of the authorities says:

"Whether the master is considered as acting under an implied contract between the owners of the vessel and the shippers of the cargo, or as the agent of all from the

necessity of the case, or as exercising a power and duty imposed upon him by the law as incident to his office—whatever may be considered the source of his authority—the power and the duty of determining what part of the common adventure shall be sacrificed for the safety of the rest, and when and how the sacrifice shall be made, appertain to the master of the vessel, *magister navis*, as the person intrusted with the command and the safety of the common adventure, and of all the interests comprised therein, for the benefit of all concerned, or to some one who, by the maritime law, acts under him, or succeeds to his authority."

Again the court says, p. 403:

"However it might be with a pilot, there is no case, in England or America, before the one at bar, in which a sacrifice made by a stranger, in no way connected with the navigation of the ship, or with the control or care of the ship and cargo, as a distinct maritime adventure, has been held to give a right to contribution in general average.

"There can be no general average, unless there has been a voluntary and successful sacrifice of part of the maritime adventure, made for the benefit of the whole adventure, and for no other purpose, *and by order of the owners of all the interests included in the common adventure, or the authorized representative of all of them.* The safety of any property, on land or water, not included in that adventure, can neither be an object of the sacrifice nor a subject of the contribution."

The natural justice of distributing a loss incurred by one for the benefit of others has not warranted courts of law or equity in extending the doctrine of general average to other than sea adventures. Upon the sea it was justified as part of the ancient law, found as an established doctrine in the earliest accounts, and, as found, it was a doctrine in principle and practice confined to a single

ship and the merchandise on board; it was as an established principle that the law of England and America embraced it, and while it has been and may be extended within that principle, it never has been, and may not properly be, extended to embrace other subjects.

Since this court has held, in common with other courts of last resort, that the right must be found in the relation of the master, *as master*, with authority over the associated interests and every part of them, representing the authority of the owner of each, we submit that this is the real principle of the right of general average, that contribution must be confined to the interests over which the master has supreme authority in that representative capacity, and that this cannot be found out of the ship which he commands.

As this court has frequently held, the captain is master, and he must act because the law imposes upon him the authority and clothes him with the power to judge and determine.

The Star of Hope, 9 Wall., 203-230.

V. THERE WAS NO GENERAL AVERAGE SACRIFICE.

a. THE MASTER OF THE STEAMER WAS WITHOUT AUTHORITY TO MAKE SELECTION.

The master of a towing steamer is not the agent of the vessel in tow; he is not the agent of her cargo, but is and remains a stranger to them. How can he then, under the principle of general average, make a sacrifice of or for them? The unit of a marine adventure is the ship and what she contains. If there are several vessels in tow, the master of one of the vessels may find it necessary to make a jettison, and has the fullest authority to do so without consulting with the master of the steamer; indeed, he is the only man who has authority as to the cargo of his own vessel, and the law imposes upon him the duty and clothes him with that power. It has frequently occurred that one of a tow of several vessels has become water-logged and made jettison of a portion of her cargo, or has made a jettison to right the vessel. It is a matter of common knowledge that in these cases general averages are stated involving simply that vessel, her cargo and freight. It has never been supposed, even where towed under the customary method of rating compensation by a portion of the freight, that the steamer or any other vessel in the tow was interested.

If a towing steamer find herself in the position where she must either jettison a part of her cargo or cast off the tow line, no one would question that the master's duty would be to cast off the line. If in such circumstances the master should jettison valuable cargo, he could not ask contribution of his tow and their cargoes. The answer at once would be that while the master, as to his own vessel and the interests on board of her, became the representative of all in time of danger, with paramount authority to sacrifice a portion for the benefit of all, he does not so represent the vessels in tow and their cargoes, and may not make selection, as between them, and charge the loss upon all. He does not stand in the relation of *magister navis* to the vessels in tow and their cargoes; the owners of those vessels are not responsible for his acts; they are not chargeable with his faults. The cargo on board his own vessel has been entrusted to him; the owners of cargo must bear the consequences of the master's acts, as their representative, in certain contingencies; but, in putting cargo on the steamer, they certainly do not contemplate being involved in contribution for another vessel or her cargo, with which they have no relation whatever.

Again, if a steamer has several vessels in tow upon an arrangement to be paid a proportion of the gross freight for towage, it might be that without fault the stern vessel of the tow had to be cast off; that might be done by her

own master or by the master of the vessel next to her, to which her line was fast; it might be done by request of the master of the towing steamer. If it be the latter, it could hardly be claimed that the other vessels in the tow, including the steamer, and their cargoes and freight lists would be chargeable with a general average contribution. Where, in such towage, a steamer or her tows or both are voluntarily run on the bank of one of our crowded channels in order to avoid collision, as not infrequently must happen, the expense of release has never been adjusted as between the different vessels and cargoes. As was said by Lord Justice Brett in Burton vs. English, 12 Q. B. D., 220, of the act of the captain in making a proper jettison:

> "It may be said to be done as servant of the cargo owner, for the safety of the whole adventure, and the general maritime law then gives the cargo owner, quite apart from the contract, a right to general average contribution at the hands of the ship owner."

But in no sense can the master of a towing steamer be held to be the agent, for this or for any other purpose, of the vessel in his tow or her cargo.

Concerning the remarks of the Circuit Court (p. 33, fol. 501), as to the termination of the contract of affreightment and the contract of towage by the general average act:

This does not seem to us to be there used as affirmative argument. If the idea embraced in that portion of

the opinion be urged or put forward as affirmative argument, the fallacy of it for that purpose lies in this. Granting that the contract of affreightment does terminate upon a jettison, it is not true, in either case, that the mere circumstance that the contract terminates, considered apart from the legal reasons, methods and consequences of the termination, fixes any rights or is more than an incident. When sufficient cause arises the entire relation between the steamer and the tow and her cargo is cut off. We look to the contract of towage in vain for any authority of the master of the steamer over the tow for any purpose not connected with and necessary to the performance of the contract; we look in vain to the established law of the sea for new duties, representation, custody, charge or responsibility concerning the tow or her cargo, surviving the termination of the contract of towage. While, if we may grant that the contract of affreightment terminates, (which is hardly true in the broad sense), still it terminates only because, and so far as, it is supplanted by higher duties to the cargo then imposed upon the master as *magister navis*.

b. THE BARGES WENT ASHORE AT THE TIME AND PLACE AND IN THE MANNER THEY WOULD HAD THE TOW LINE NOT BEEN CUT.

It is established law that the mere fact that property sacrificed was, in common with all of the adventure, doomed

to destruction if a sacrifice were not made, does not avoid obligation to contribute for it; but it remains true that if the property claimed to have been sacrificed was bound to be destroyed in substantially the same *place and time and manner*, there was no sacrifice; and if the property not lost is merely saved out of a common disaster and from a common wreck, without the transferring of peril or loss from the property saved to other property, which was thereby vicariously sacrificed, there is no foundation for a general average claim.

Shoe vs. Low Moor Iron Co., 1 U. S. App., 39.

The statement of facts, which followed the evidence in the case closely, is very clear:

The steamer and tow "were driven on a lee shore, and all were in imminent, if not certain, peril of being blown ashore and lost. The Donaldson struggled against the storm to the last moment she could with safety to herself, and then, in order to prevent her from going ashore and being lost, her master, after first giving notice with her steam whistle of his intention to do so and without negligence on his part, cut the tow-line connecting the said barges to her, and the said barges were driven on shore and were wrecked and lost, and the Donaldson, by reason of being thus disincumbered of her tow, was enabled to reach a port of safety."

The situation is the same as if the tow by reason of the storm instead of going ashore had been sinking, and were about to drag the Donaldson down with them, when the latter cut the line and, without transferring to the barges a particle of her own risk, or making their case any harder, herself escaped from the general wreck.

It was not the casting off of the line that stranded the vessels nor was that result hastened or retarded by the act; there was not, for either tug or tow, any choice of perils. The severance of the tow line was a necessary step to rescue the steamer, but it is as certain, in the condition and circumstances of the vessels, that it did not lessen or vary their chance of safety. The stranding was not intentional, nor the result of the general agency of the master of the steamer.

The Star of Hope, 9 Wall., 203.

Fowler vs. Rathbones, 12 Wall., 102.

All of the tow were being driven on shore in spite of every effort; the tow line was cut and the barges went ashore; it was immaterial to them whether they all went ashore with the line fast, or whether the line was cut and the steamer, thus disencumbered, worked out from the shore. It was a case, not of voluntary stranding, but of shipwreck.

Emery vs. Huntington, 100 Mass., 431-436.

Crockett vs. Dodge, 12 Me., 100.

Emerigon on Insurance, Chap. XII, Sec. XLI., 473 says of shipwreck:

"It is the same with this case as with a fire, he who saves his own saves it for himself."

It is within the distinction alluded to by the court in Ralli vs. Troop; that for money voluntarily paid by

the master to ransom ship and cargo from pirates there shall be contribution, but not so as to goods and money taken by pirates.

As both courts agreed in this case and the question certified shows, the act of cutting the line was justified, not for the common benefit, but as the last resort of a single participant whose safety was possible. The real transaction was not that the Donaldson sacrificed her barges for her own safety, but that she refused properly and lawfully to remain and go ashore with them.

Respectfully submitted,

HARVEY D. GOULDER.

The opinion of the District Court was not officially filed, and, therefore, not made a part of the record in this case. For the convenience of the court, we file herewith printed copies of the opinion as reported 19 Fed. Rep., 264, to which reference is made in the opinion of Mr. Justice Matthews.

167-599

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SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1895.

THE PROPELLER "J. P. DONALDSON," ROBERT HOLLAND, CLAIMANT, *Appellant*,

vs.

THE BARGE "ELDORADO," WELTHA A. SLYFIELD, OWNER, and the BARGE "GEORGE W. WESLEY," CHARLES SONSMITH, *et al.*, OWNERS, *Appellees*.

No. 29.

BRIEF FOR APPELLEES.

FRANK H. CANFIELD,
Advocate.

F. H. and GEO. L. CANFIELD,
Proctors for Appellees.

DETROIT, MICH.:
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1896.

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On a certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLEES.

The question certified to this court by the Circuit Court of Appeals, is one of general average.

To consider it properly, it is necessary to keep in mind the facts of the case not only as they are stated in the certificate itself, but also as they more fully appear in the opinion of Justice Matthews, from whose decision this appeal was taken. This opinion, together with the pleadings in the cause, was, by order of the Circuit Court of Appeals, made a part of the record in this court. In view of the manner in which the case was certified, that opinion should be treated as containing a statement or finding of facts in the case upon which is raised the precise question, in respect to which the instruction of the Supreme Court is desired.

The certificate of the Circuit Court of Appeals states the facts as follows :

"The J. P. Donaldson was towing the barges Eldorado and "George W. Wesley, from Buffalo, New York, to Bay City, "Michigan, having no other connection with them than that "she was to tow them and receive for her services a portion of

"freight which the said barges would earn on the trip, accord-
"ing to the custom and usage which prevails upon the Great
"Lakes. By a violent storm and without negligence on the
"part of the J. P. Donaldson, she, with her tow, was driven on
"a lee shore, and all were in imminent, if not certain, peril of
"being blown ashore and lost. The Donaldson struggled
"against the storm to the last moment she could with safety to
"herself, and then, in order to prevent her from going ashore
"and being lost, her master, after first giving notice with her
"steam whistle of his intention to do so, and without negli-
"gence on his part, cut the towline connecting said barges to
"her, and the said barges were driven on shore and were
"wrecked and lost, and the Donaldson, by reason of being
"thus disencumbered of her tow, was enabled to reach a port
"of safety." (Rec. 1).

Mr. Justice Matthews found (Rec. 26) that the facts and circumstances material in the investigation of this as a question of law are not disputed and are in substance as follows:

> "The J. P. Donaldson was a steam propeller, with a
> "crew of 16 officers and men, built for the carrying trade,
> "not an ordinary tug, having no cargo on board, on the
> "voyage during which the loss complained of occurred,
> "but her fuel, amounting to about 120 tons. She had in
> "tow three barges, the Bay City, the George W. Wes-
> "ley, and the Eldorado, in the order named, on a voyage
> "from Buffalo to Saginaw or Bay City. The Bay City
> "was partly laden with coal, the others were light. The
> "George W. Wesley was a schooner barge ; the Eldor-
> "ado was an old propeller bottom. Neither of them had
> "any power of self-propulsion. The contract of towage
> "was for the voyage, the propeller to receive for her
> "service a proportion of the freight earned by each
> "barge. When near Erie, Pennsylvania, and in a blind-
> "ing snow, they were drifting near the rocks on shore
> "and in imminent peril of stranding. The propeller,

"having signalled her tow to that effect, cut the towing "line and cast them off. They were driven on shore "and wrecked. The propeller at once put into the har- "bor of Erie in safety. It is a reasonable conclusion "that if the propeller had not cut loose her tow, all would "have gone ashore together."

It further appears from the record that the propeller was "not an ordinary tug"; that the barges "were dependent altogether upon the propeller for motive power; that they were powerless for any purpose of navigation, and could only by means of a single sail, ground tackle and steering apparatus, co-operate with the propeller in its control over them; and that the master and crew of the barges had no voice in the management of the propeller, or in the conduct of their own craft, except in obedience to signals from the propeller." (Rec. 33.)

It will be seen that the towage service which the Donaldson had undertaken to perform in this case differs materially from ordinary harbor towage. It also differs from towage rendered by a tug, which, as is frequently the case, is employed by the day or by the hour at a fixed price, and whose compensation is not dependent upon the freight earned by the vessel which it has in tow. It differs also from the service mentioned in the reported cases in the English courts, where the tug is considered as the servant of the vessel in tow, and bound to obey the instructions given by the latter.

As is stated in the opinion of Justice Matthews, (Rec. 35.)—

"Contracts of towage like that in the present case are "exceptional, and of comparatively recent origin, peculiar "to lake and river navigation. They differ very essenti- "ally from the ordinary and usual towing contracts for "towing vessels into and out of the port, or for short dis- "tances in narrow and tortuous channels. It was in refer- "ence to one of such that Sir Robert Phillimore spoke in "*The I. C. Potter*, L. R. 3 A. & E. 294, where the service "to be rendered was defined and limited and for a custom-

"ary fixed price, and where it was held that, even without "formally abandoning the contract, the towing vessel, cir- "cumstances of serious danger having supervened not "in contemplation of the parties to the contract, was "entitled to salvage reward for bringing her tow safely "into port, on the ground that she would have been justi- "fied in deserting her. The circumstances of the present "case preclude the application of any such principle, for "in regard to craft such as the barges which constituted "the tow, it cannot be supposed that it was contemplated "by the parties, that in any emergency they could take "care of themselves."

I think that it will be conceded that the towage service was for the round trip, and that the freight of the barges of which the propeller was to receive a proportion for her service, was the freight which they would earn on the round trip.

The question certified, therefore, is this :—

Does the law of general average apply to *such* a propeller towing *such* barges under *such* a contract, if, in the prosecution of the voyage, a common peril is encountered, to escape which the barges are necessarily sacrificed under the order of the master of the propeller, such sacrifice resulting in the safety of the propeller.

We feel that it is unnecessary for us to discuss at length the principles upon which the law of general average rests, as these have been so fully considered by this court in the recent case of *Ralli v. Troop*, 157 U. S., 386.

In FOWLER VS. RATHBONES, *12 Wal., 102*, the doctrine is stated in the following broad and comprehensive language:

"Where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger, or incurs extraordinary expenses to promote the safety of all the associated interests, common justice requires that the sacrifice so made, or the extraordinary expenses so incurred, should be assessed upon all the interests which were so exposed to the impending peril, and which were saved, by those means, from the threatened danger, in proportion to the share of each in the joint adventure."

The same broad statement of the rule is adopted in substantially the same language in *McAndrews v. Thatcher*, 3 Wal., 347–366; *The Star of Hope*, 9 Wal., 203–228; *Hobson v. Lord*, 92 U. S., 397, is quoted and approved in *Ralli v. Troop*, and was adopted by Justice Matthews in his opinion in the suit at bar. (Rec., 30.)

Under the authorities, the facts necessary to bring a case within the law of general average, may be thus stated :

1. A maritime adventure, or "sea risk," in which different persons have a common interest.

2. A common peril which renders a sacrifice of a part of the adventure necessary for the preservation of the whole.

3. A voluntary sacrifice for the benefit of the common adventure, made by the master and crew themselves, or by the owner, or by some one who, for the time being, is charged with the control and protection of the common adventure, ~~He acts~~ acting as the common agent or representative of all the interests in peril.

4. The sacrifice must prove successful.

We submit that all these facts appear in the case now before the court, and therefore it is a case of general average.

1. The adventure was a maritime adventure, in which all the parties had a common interest.

2. There was a common peril, which threatened the safety of all.

3. There was a voluntary sacrifice made by the master of the propeller, who, at the time, was charged with the control and protection of the common adventure as the common representative of all.

4. The propeller, and probably the lives of her officers and crew, were saved by reason of the sacrifice.

(*a*) It cannot be disputed that the adventure was a maritime adventure or sea risk, in the success of which *all the parties had a common interest*. The libellants were interested as

the owners of the barges; the respondent, as owner of the propeller; and all were together interested in the freight which the barges were expected to earn if the adventure proved successful.

As stated by Justice Matthews (Rec. 33):

> "The propeller and barges were not strangers. They "were bound together by the contract of towage. They "were interested together in a common adventure. "They were engaged to and with each other for the "entire voyage, and each interested in its successful "issue, as the freight earned by each barge was to be "shared between it and the propeller, as a compensation "for its service."

(*b*) There was a common peril which threatened the safety of *all*, and from which no part of the adventure could be saved except by a sacrifice of a part. The sacrifice demanded by this common peril was made by the master of the propeller, by cutting the barges adrift, and the result of the sacrifice was the salvation of the propeller. All this must be conceded under the facts stated in the record, and the only question which is fairly open for discussion, is whether the master of the propeller had the authority to make the sacrifice, or, as stated in the brief of appellant's counsel (pages 9, 33), "had the master of the propeller the authority to make selection."

This leads to the consideration of the relation which the master of the propeller bears to a tow of barges which he has agreed to *tow for a portion of their freight*, "*according to the custom and usage which prevails upon the Great Lakes.*" As to this we submit that such a master is charged with the control and protection of the entire tow. He is charged with the "control and protection of the common adventure and represents all the interests included in the adventure," so far as the navigation of the tow is concerned.

This is certainly true where the propeller and barges belong to the same owner, notwithstanding the fact that each barge in

that case, as in all other cases, has her own master and crew We know as a matter of fact, according to the way business is actually carried on, that the masters and crews of barges, are not, as a rule, as experienced or skillful seamen as the masters and crews of propellers. It is upon the judgment and nautical skill of the latter that the owners mainly rely. The same is true where the barges belong to different owners and are towed under an agreement for the entire season. In principle the master of the propeller stands in the same relation to the barges when they are towed only for a single trip for a proportion of the freights earned by the barges. The parties in such a case have a common interest in the success of the adventure. The master of the propeller cannot be considered as a stranger to any part of the adventure. Whatever he does in the line of his duty in the navigation of his tow as between himself and the owners of the barges, he does as the representative of all concerned. This is well stated in the opinion of Justice Matthews (Rec. 33), where it is said :

> " Here the propeller and the barges were not strangers;
> " they were bound together by the contract of towage.
> " They were interested together in a common adventure.
> " They were engaged to and with each other for the
> " entire voyage, and each interested in its successful
> " issue, as the freight earned by each barge was to be
> " shared between it and the propeller as a compensation
> " for its service. * * * The master of the propeller
> " had charge of the navigation of the whole tow for the
> " voyage, and for the purposes of that navigation, and to
> " meet its exigencies, was invested with authority to act
> " for all. No ingredient required by the rule to consti-
> " tute a case for contribution in general average seems
> " to be lacking. There is a common adventure in which
> " distinct interests are associated by a maritime contract
> " by which the whole is placed in charge of a common
> " agent authorized to act for all in its prosecution, and by
> " his authority a sacrifice is made of part in the presence

"of imminent peril threatening the loss of all, which "results in the safety of the remainder."

What is said by Justice Matthews respecting the relation of a propeller and her master to the tow, accords with what has been said by the courts in many other cases.

In THE LYON, Brown's Adm. 59, a libel was filed against the tug to recover damages sustained by a schooner which the tug had contracted to tow from Lake Huron to Lake Erie for the usual compensation, it being claimed that the damages were the result of negligence on the part of the tug. In deciding the case, Judge Wilkins said:

"The case involves the construction of the contract of towage, which certainly, whether expressed specially or not, implies that the vessels in tow are for the time under the government of the master and crew of the tug. * * * As a general rule a ship in tow is under the direction of the tug, and if obedient, and a collision occurs, the latter will be held responsible for the damage."

In THE ZOUAVE AND RICH, Brown's Adm., 110, the same judge said:

"Having contracted for safe towage, the *Rich was under the control and government of the tug, and her duty was simply to follow her lead, obey her direction and faithfully submit to her guidance.* * * * The contract of towage comprehends safe pilotage. * * * The contract embraces more than safe progress against adverse wind, or the supply of speed when there is no wind."

In THE MORTON, Brown's Adm., 137, Mr. Justice Swayne said:

"The tug has the *full government and care of the vessels* towed; she must direct the length of the lines, the order in which they shall be towed."

In THE MARGARET, 94 U. S., 494, this court, speaking through the same learned justice, said:

"The tug was the *dominant mind and will in the adventure.* It was the duty of the brig to follow her guidance, to keep as far as possible in her wake, and to conform to her directions."

See also THE CLEMATIS, Brown's Adm., 499.

In THE QUICKSTEP, 9 Wal., 670, it is said:

"It is well settled that canal boats and barges in tow are considered as being *under the control of the tug*, and the latter is liable for this collision unless she can show that it was not occasioned by her fault. It was the duty of the tug, as the captains of the canal boats had no voice in making up the tow, to see that it was properly constructed and that the lines were sufficient and securely fastened. This was an equal duty, whether she furnished the lines to the boats or the boats to her."

In STURGIS v. BOYER, 24 How., 110, it is said:

"Whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such employment, undertakes to transport another vessel, which, for the time being, has neither master nor crew on board, from one point to another, over waters where such accessory power is necessary, or usually employed, she must be held responsible for the proper navigation of both vessels; * * * and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it makes any difference in that behalf, that a part, or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise."

In THE SYRACUSE, 9 Wal., 672, it is said:

"A tug with vessels in tow * * * is bound to consult their safety as well as her own. She must see that 'what clears her of danger does not put them in peril.' For many purposes they may be regarded as part of herself."

In TRANSPORTATION LINE v. HOPE, 95 U. S., 297, which was an action at law arising out of a contract on the part of the defendants to tow the plaintiff's barge from Jersey City to New Haven, the court had charged the jury that,—

"As a necessary incident of this engagement, the defendants were entitled and were bound to assume supreme control and direction of the plaintiff's boat, and of the persons in charge of her, so far as was necessary to enable them to fulfill their engagement, and they were bound to exercise such degree of diligence and care as a prudent and skillful performance of the service for which they stipulated would require."

And this was approved by this Court in an opinion by Mr. Justice Hunt in which it is said that the barge,

"——could not be towed except by being taken in charge by the tug, that is, under its care and control and management. When the master of a tug undertakes to transport a barge, he must apply the means for that purpose. He must furnish motive power not only, but he must direct her

location, whether on the port or the starboard side, whether she shall be the inside boat or the outsideone, when and how she shall be lashed to other boats, with what fastenings she shall be secured as she is dragged through the water, whether she shall go fast or slow; when, if at all, she shall drop astern, when she shall go to harbor, how long remain there, and what shall be her course of navigation. These tows consist at times of thirty or forty boats; and they must all be under one head, and subject to one judgment, which is that of the transporter. * * * The charge of the judge * * * that the transporter had the supreme control of the barge, so far as it was necessary to enable it to fulfill its contract to tow the barge, was correct."

In THE MERRIMAC, 2 Sawyer, 587, a tug had undertaken to tow for a specified sum a "schooner scow," which was provided with its own master and crew. It was held that while the tug could not be regarded as a common carrier, yet the contract was one of bailment and constituted the libellant the bailor, and the respondent, the owner of the tug, the bailee of the scow and her cargo. The Court say:

"With the exception of steering the tow, working her pump and handling her end of the towline, the tug is responsible for the navigation of both vessels. Her duties were those of the private carrier for hire, just as much as if she had her upon her own deck instead of astern at the end of a towline." (Citing *Sturgis v. Boyer*, 24 How., 122.) "While in this case the tow had her master and crew on board, yet they had nothing to do with the navigation of their vessel, except to steer the tow in the wake of the tug, to work her pump and handle her end of the towline. In other respects the navigation of the tow was as much under the control of the tug as if there had been no one on board of her."

In THE ADELIA, 154 U. S. 593, this Court also recognized the authority of the master of the towing steamer to control the tow. A tug with a tow of barges on the Hudson River, negligently grounded, and one of her barges was injured and sunk in consequence. The master of the tug sought to charge the barge with contributory negligence, because there was no one on her deck at the time. This defense was not sustained, and in the course of the opinion the following significant language is used:

"*Besides the whole tow as well as the tug was under the direction of the master of the latter*, and it does not appear that *he* required the people in the barges to be on the lookout."

Thus the Court not only recognizes the *general* authority of the tug-master over the tow, but also his authority to direct as to keeping a lookout on the barges.

I submit that, under the authorities, the master of the propeller in this case is not to be regarded as a stranger to the barges which he had in tow, but as one charged with the control and protection of the common adventure. He had authority to determine the order in which the barges should be towed, when they should start on the voyage, what the course of the tow should be, whether they should seek harbor or not. We know as a matter of fact upon the lakes, that he determines not only the order in which the barges shall be towed, (*The Sweepstakes*, Brown's Adm. 510, 512), but the length of the towlines; and that it is a common custom and usage for the crew of the barges to shorten or lengthen the towlines, to set or lower the sails, in cases where the barges are provided with spars and sails, to cast anchor or to raise anchor, and to cast off their towlines in obedience to the orders of the master of the propeller, given in accordance with a well understood code of signals. Whatever the master of the propeller does in the navigation of the tow, he does as the common representative of all who are interested in the adventure. He is entitled to exercise his judgment with respect to the navigation of the tow in the same manner and to the same extent that he is entitled to exercise it if he were navigating his own ship unencumbered by a tow. It was upon this very ground that Mr. Justice Brown, then District Judge, decided that the master of the Donaldson could not be held liable for the loss of the barges upon the ground of negligence in taking an improper course after he started upon the voyage now in question. In his opinion (see 19 Fed. 266) he said:

"There is a great conflict of testimony as to the propriety of the course taken by the tow after leaving Buffalo. * * * I think it is clearly one of those cases where the master might, in the exercise of sound judgment and reasonable discretion, have taken either course without being chargeable with negligence. His choice, of course, was largely dependent upon the season of the year, the state of the weather, the velocity of the wind, the probability of a storm, and the proximity of harbors of refuge; an

we are not inclined to review his judgment in that particular. The disaster which befell him, undoubtedly tends to show that he made the wrong selection, but the propriety of his action must not be determined by the result. He can only be chargeable with negligence when he takes a course which good seamanship would deem unauthorized and reckless. The owner of a vessel does not engage for the infallibility of the master, nor that he should do in an emergency, precisely what, after the event, others may think would have been best. * * * Whether he should attempt to turn about and make the harbor of Buffalo was also a question upon which he was at liberty to exercise his judgment."

The opinion of the District Judge upon this point is largely based upon the cases of *Lawrence v. Minturn*, 17 How. 100, and *The Star of Hope*, 9 Wal. 230, each of which was a case of a master of a single vessel unencumbered by a tow.

In LAWRENCE V. MINTURN, the question was whether the vessel was liable for certain goods shipped on board which were jettisoned by the master, and it was said :

"The nature of the case imposes on the master the duty and clothes him with the power to judge and determine upon the facts before him whether a jettison would be necessary. He derives this authority from the implied consent of all concerned in the common adventure. The obligation of the owners is to appoint a competent master having reasonable skill and judgment and courage; and they are liable, if through his failure to possess or exert these qualities in any emergency, the interest of the shippers is prejudiced, but they do not contract for his infallibility, nor that he shall do, in an emergency, precisely what after the event, others may think would have been best."

THE STAR OF HOPE, *supra*, was a case of general average where the same doctrine is announced.

THE W. E. GLADWISH, 17 Blatch., 77, decided by Chief Justice Waite, was a case of towage, and is also cited by the district judge in his opinion as an authority to the same point.

The logical conclusion to which the authorities point is that the right and the duty of the master to act in an emergency and to bind all the parties interested in the adventure, applies as well to cases of towage as to cases of vessels laden with cargoes without tows.

The authority of a master of a propeller towing barges which are wholly dependent upon the propeller for propulsion,

and which are thus practically as helpless and as unable to navigate "as so much dead freight," differs in no respect from that of the master of a vessel whose cargo is laden on board, so far as the management and navigation of the tow is concerned. This is shown by numerous authorities, but nowhere more clearly than in the opinion of Justice Brown in this case, wherein he shows that the owners of the Donaldson are not to be held in fault for the loss of the barges, although her master may have erred in his management of the tow.

Now, why is the master of a tow at liberty to exercise his judgment, and why does his decision, if fairly made, bind the owners of the barges as well as the owner of the propeller? It is because he is to be considered as the representative of all in the navigation of the tow. In this respect he represents the barges to the same extent, and his judgment with respect to the management and navigation of the tow binds them and their owners as well as it binds the propeller and her owner. His is the "dominant, i. e., *the ruling, governing, controlling mind of the adventure.*"

If the master of the steamer is charged with the duty of deciding what shall be done in the navigation of the tow generally; when they shall start upon their voyage, what the course shall be, what the speed shall be, whether in case of storm it is safe to pursue the voyage or whether prudence demands that they shall seek a harbor of refuge, and if so, when they shall resume the voyage;—and if his decision binds not only the steamer and her owners, but the barges and their owners also, so that he is not to be held liable for errors of judgment by either, because he is considered as being authorized as the common representative of all to act according to his judgment as the emergencies arise, why should he not be considered as acting as the common representative of all, if he decides that a sacrifice of some of the cargo or of the tow is demanded because of a common peril to which the whole adventure is exposed? If he makes such a sacrifice, and thereby aves the other parts of the adventure, why should there not be

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a contribution to make good the loss resulting from the sacrifice?

The justice and equity of requiring such a contribution on the part of the several interests benefited by a sacrifice for their common benefit is as apparent where goods are transported under a general custom and usage by steamers with consorts or barges in tow, as it is in cases where the goods are transported by steamers without tows. The same reasons exist for applying the rules of general average in the one case as in the other.

Take this as a practical test: A., the owner of a propeller whose carrying capacity is 60,000 bushels of wheat, and a barge of the same capacity, contracts with B., to transport 120,000 bushels of wheat from Duluth to Buffalo. Instead of making two voyages with the propeller alone, he sends with her the barge in tow astern, and the entire 120,000 bushels is laden upon the two vessels for a single voyage. In the prosecution of that voyage, in order to avert a common peril, the master of the propeller jettisons a portion or all of *her* cargo, and thereby saves not only the propeller and the barge, but the cargo of the barge as well. This clearly would be a case for general average, in which the value of the wheat jettisoned should be apportioned on the entire property saved, to-wit: the propeller, the barge and the cargo of the barge as well as the freight. The justice and equity of calling upon all the interests to contribute according to the value of all the property saved by reason of the sacrifice, is at once evident; and it is the same justice and equity which underlies the law of general average as applied to a single vessel and cargo in cases of jettison. In the supposed case, the peril is such as to demand a sacrifice of some kind, either the cutting away of the barge, or the jettisoning of the cargo of the propeller. The duty of deciding is cast upon the master of the propeller. He alone knows the situation. He may not be able to consult with the men on the barge. He is compelled to act; and in the exercise of his discretion and judgment, he determines to jettison his own cargo, and hold on to the barge. He thereby saves not only the propeller, but the

barge and the cargo of the latter also. I submit that in such a case the master acts as the common representative of all concerned, and the loss is as clearly a general average loss as it would be if the entire 120,000 bushels of wheat had been laden upon a single steamer, and half of it had been jettisoned to avoid an impending peril.

It is well settled that an *extraordinary expenditure* incurred by the master of a ship, for the safety of a common maritime adventure is to be treated as a general average loss and is to be contributed for by the several interests saved thereby.

McAndrews vs. Thatcher, 3 Wal., 347, 370.
Star of Hope, 9 Wal., 203, 228.
Fowler vs. Rathbones, 12 Wal., 102, 118.
Lowndes on Gen. Average, 148.
Carver on Carriage by Sea, Sec. 391.

Thus the master of a ship has authority, in case of need, to engage the services of salvors, and to bind both the ship and cargo to the fulfillment of any reasonable contracts he may make for their remuneration.

Lowndes on Gen. Average, 150.
Carver on Carriage by Sea, Secs. 396, 397.
McArthur on Ins., 171.

This principle applies as well to the master of a propeller engaged in towing barges according to the custom and usage prevailing on the Great Lakes for a proportion of the freight earned by the barges, as to a master of a single ship not engaged in towing, but which has on board of herself her entire cargo.

Suppose the master of the Donaldson, when he discovered that her engines were not powerful enough to handle the barges and hold them against the storm, and that both the propeller and the barges were in danger of going ashore, instead of cutting the towline, had called to his assistance another steamer, and with the help thus obtained the barges as well as the Donaldson had been saved from the impending peril, by whom should the expense of the steamer thus called upon for

assistance be borne? Certainly not by the propeller alone, but by the propeller and the barges upon the principles of general average. Or suppose the master of the Donaldson had entered into an agreement with the master of the assisting steamer as to the price to be charged; would not that agreement, if fair and reasonable as to amount, bind the barges as well as the propeller? Necessity in such a case might require immediate action, and the agency of the master would spring from such necessity and clothe him with the power to act for the barges as well as for himself, in the same manner that it would authorize him to act if, instead of being laden with the barges, the steamer was laden with a cargo on board.

Again: If the Donaldson, in the case at bar, had been loaded, and her master had concluded that it was necessary, in order to avoid the impending peril, to sacrifice either her cargo or the barges, and in the exercise of his discretion, instead of sacrificing the barges, had jettisoned the propeller's cargo, and thereby enabled both the propeller and the barges to outride the storm and reach a port of safety, would it not then be a clear case for general average? Under such circumstances could the owners of the barges justly refuse to contribute to the loss of the propeller's cargo? Justice and equity would demand such a contribution from them, and I submit that there is no principle of law which would forbid it.

In CARVER ON CARRIAGE BY SEA, Sec. 294, it is said:

"The master of the ship is the servant of the shipowner, and has custody of the cargo primarily for the purpose of carrying out the shipowner's contract." [So the master of a towing ship is the servant of the shipowner, and has control of the tow primarily for the purpose of carrying out the shipowner's contract.] "Emergencies, however, sometimes occur during the course of a voyage, in which a need arises for the presence of someone who can act on behalf of the owners of the goods, with an authority beyond that ordinarily given by the contract. And in such cases the master, or other person in command of the ship, has this authority and duty to act for the cargo owners. He carries with him a power, in case of necessity, to deal with their goods as though he represented them."

So the master of a propeller towing barges for a proportion of their freight, when necessity arises for someone to determine

whether assistance shall be obtained to save all concerned from a common peril, or whether a jettison shall be made, or whether the barges or some of them shall be cut loose, is empowered to decide, and in doing so exercises power to deal with the barges as though he represented them. Someone must exercise such authority in such emergencies. The master of the propeller is the only person who can exercise it. The authority is cast upon him by reason of the necessity.

The Star of Hope, 9 Wal., 230.
Lowndes on Av., 26.

To bring the case within the rules of general average, it is not necessary that the propeller should have assumed the obligations of a common carrier. The right to contribution does not depend upon the contract of carriage or transportation*; otherwise the rules of general average would apply to very few cases under our law as it exists at the present time. Thus a common carrier is an insurer against loss by fire and against every loss not caused by the perils of the sea or a public enemy. But by law (R. S., § 4282) the owner of a vessel is exempt from loss or damage to the cargo by reason of fire happening on board his vessel without the design or neglect of such owner. A similar statute exists in England, yet it is held both in England and in this country, notwithstanding those statutes, that the owner of a vessel is liable to contribute in general average for damage by water poured upon the cargo to extinguish fire, and that the statute does not release him from such liability.

The Roanoke, 46 Fed., 297; 53 Fed., 570; 59 Fed., 161; 18 U. S. App., 407.
Whitecross Co. v. Savill, 8 Q. B. D., 653.

By the Act of February, 1893, known as the "*Harter Law*," the owner, in effect, is relieved from all the liabilities of a common carrier of goods, provided he exercises "due diligence" to make his vessel seaworthy and properly manned,

* General average frequently arises in instances where the vessel is without cargo. *Potter v. Ins. Co.*, 3 Sumner, 27; and see appellant's brief, 29.

equipped and supplied. Yet it has never been held nor suggested that this act could relieve him from his obligation to contribute in general average.

A large majority of the steamers upon the lakes engaged in the carrying trade are run under special charters for their entire carrying capacity. Sometimes these charters are for a single voyage,—sometimes for the entire season. A vessel thus chartered and employed is not a common carrier.* Yet her owners are liable to contribute in general average the same as the owners of vessels which have a fixed route, and which are held out to carry for the public generally.

If the rules of general average apply under the "*Harter Law*" to vessels specially chartered for the season, or for particular voyages, and to cases where the vessel and her owner are released from the liabilities of common carriers, because of the terms of the contracts under which they are engaged,—if, in short, they apply to vessels generally, irrespective of the contracts of carriage under which they are employed†, then we have a right to conclude that if we exempt the Donaldson from her obligation to contribute in general average for the loss of the barges in this case, some argument must be produced other than that which is based upon the fact that she was not engaged in the business of a common carrier.

There are some observations in the brief of appellant's counsel, a copy of which was received after our own was mainly written, to which we desire to reply in few words :

1st. At p. 7 of their brief, counsel say that Justice Matthews' opinion "has not been adopted in any other case" since its publication. It does not appear that any case has arisen, or been litigated, since the opinion was delivered, in which the question

* The Niagara, 21 How., 7; The Dan, 40 Fed., 691.

† The fact that general average is not incidental to the contract of carriage, is shown by the decisions that even express stipulations to the contrary in the contract will not avail against the liability to contribution. *Marwick v. Rogers*, 163 Mass., 50; *Crooks v. Allen*, 5 Q. B. D., 38; The *Roanoke*, *ante*, and *Burton v. English*, 12 Q. B. D., 218. The general average act is wholly external to the contract of affreightment. *McArthur on Marine Insurance*, 16, and cases ited.

under consideration was involved. No such case is cited by appellant's counsel, and we know of none.

2d. It is also stated (same page of brief), that Justice Matthews subsequently doubted the correctness of the conclusion to which he arrived. As to this we can simply state that the case was fully argued before him, both orally and on briefs by counsel for both parties ; that the appellants were represented by Hon. Henry H. Swan, now judge of the Eastern District of Michigan, whose printed brief was elaborate and full, and contained a citation of nearly every authority which is cited by the learned counsel who now represents the appellant. It is not too much to say that every point which is now advanced by appellant's counsel was urged before Justice Matthews, and was considered by him. The opinion itself shows that the case was not disposed of hastily, but that it received a most painstaking investigation at the hands of that learned justice. We think it safe to say that among the many able opinions delivered by him as member of this Court or when sitting at the Circuit, there are few, if any, which received more careful investigation, diligent study or which show greater judicial learning, than the opinion delivered by him in this case. We believe that it is unanswerable.

3. As to the "novelty" of the claim. This was most persistently urged before Justice Matthews by the counsel who then represented the appellants, and is referred to in the opinion. (See Rec. 34). While it is true that the business of towing under certain kinds of contracts has been carried on for many years, yet, as stated by Justice Matthews (Rec. 35), contracts of towage like that in the present case are exceptional and of comparatively recent origin—peculiar to lake and river navigation.

Counsel (brief, p. 8), cite a case decided by Judge Longyear in 1874. It will be remembered that the litigation in the present case has been long protracted, having been commenced in 1880.

But while the claim itself may be in a sense novel, the *prin-*

ciples upon which it is founded are as old as the history of navigation. It is the duty of the courts to apply established and well recognized principles of justice and equity to cases as they arise, for the purpose of enforcing the rights of parties. Precedents in such matters do not constitute the law. At most they merely show how the courts have applied the principles involved in certain cases which have arisen, which necessarily vary as the customs and usages of business change. This is especially true in respect to the law of general average.*

In THE STAR OF HOPE, 9 Wal., 231, it is said:

"Controversies respecting the allowance of adjustment of general average more frequently arise in cases where the sacrifice made consisted of a jettison of a portion of the cargo, than in respect to any other disaster in navigation.

"Explanations and illustrations upon the subject, therefore, whether found in treatises or in judicial decisions, are usually more particularly applicable to cases of that description than to a case where the vessel was stranded, but the leading principles of law by which the rights of parties are to be ascertained and determined in such cases are the same whether the sacrifice made consisted of a part of the cargo or of a part or the whole of the ship, as the controlling rule is, that what is given for the general benefit of all shall be made good by the contribution of all, which is the germ and substance of all the law upon the subject."

4. Counsel (brief, p. 18), contend that the steamer and her master do not become the agent of the tow, citing *Sturgis v. Boyer*, 24 How., 110. But that case upon this point simply holds that the relation of agency does not exist as to third per-

*That the right to maintain an action is not barred by the novelty of the claim on which it is founded, is well illustrated by *Ashby v. White*, 1 Smith's Lead. Cases, 464, and the note at page 490, where it is said that "the courts have always held that the novelty of the particular complaint alleged in an action on the case is no objection, provided an injury cognizable by law be shown to have been inflicted on the plaintiff." Thus in *Chapman v. Pickergill*, 2 Wilson, 146, which was an action for falsely and maliciously suing out a commission of bankruptcy, Pratt, C. J., in answer to the objection that the action was of a novel description, said that "this had been urged in *Ashby v. White*, but he did not wish ever to hear it again. This was an action for a tort; torts were infinitely various, for there was not anything in nature that might not be converted into an instrument of mischief." So in *Pasley v. Freeman*, 3 T. R., 63, per Ashurst, J.: "Another argument which has been made use of is that this is a new case, and that there is no precedent of such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition, in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago. If it were not so, we ought to blot out of our law books one-fourth part of the cases that are to be found in them." In *Wins-*

sons, so as to render the tow liable for the wrongful acts or negligence of the steamer or her master.

5. It is also urged by counsel (brief, 18, 19), that if the steamer by reason of a storm is unable further to continue the performance of the towage contract "without too serious danger to herself." she is at liberty to abandon it, etc.

But the same is true of a vessel without a tow which has contracted to carry a cargo on board. If such a vessel encounters a storm which prevents her from continuing the performance of her contract of carriage "without too serious danger to herself," her master may jettison the cargo and thus abandon the contract of carriage. But the vessel in such case must contribute in general average.

6. It is also suggested (brief, p. 19), that the steamer is relieved from obligation under the towage contract if the tow becomes "shipwreck." There is nothing in Justice Matthews' opinion cited which sustains any such suggestion.

Just what counsel mean by "shipwreck" in this connection, is not clear. All such contracts are subject to the perils of the sea. The same is true generally of all contracts of carriage by sea. But the steamer cannot lawfully abandon her tow merely because a storm is encountered, or because the tow breaks adrift, or becomes stranded. She is still bound to do all she can, consistent with her own safety, to save the tow.

Newson's Law of Salvage and Towage, 149.
The Clematis, Brown's Adm., 432.

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more v. Greenbank, Willes, 577, the declaration stated that the plaintiff's wife unlawfully, and against his consent, went away and absented herself from him, and that during her absence a large estate was devised to her separate use; that she thereupon became desirous of being reconciled and cohabiting with her husband, but that the defendant persuaded and enticed her to continue apart till her death, which she did; whereby the plaintiff lost the comfort and society of his wife, and her assistance in his domestic affairs, and the profits and advantage of her fortune. On motion in arrest of judgment it was objected that the action was unprecedented; but Willes, C. J., said "that the form of action on the case was introduced for this reason, that the law would never suffer an injury and a damage without a remedy, and that there must be new facts in every special action on the case." Numerous other instances might here be cited, but this is so clear a matter that it seems unnecessary.

In *Broom's Legal Maxims*, 3 Ed., p. 182: It is said "that the principle adopted by courts of law is that the novelty of the particular complaint alleged in an action on the case is no objection, provided that an injury cognisable by law be shown to have been inflicted on the plaintiff; in which case, although there be no precedent, the common law will judge according to the law of nature and the public good."

This principle so well recognized at the common law ought to prevail in the admiralty, "the chancery of the seas."

In some instances, it is true, she will be entitled to additional compensation in the nature of salvage if she renders extraordinary services which prove successful. But this does not tend to show that the law of general average ought not to be applied in a case like the present, but rather leads to a different conclusion. For, if a steamer, although under a contract of towage, renders extraordinary services, or makes what is equivalent to a sacrifice for the benefit of the tow; *e. g.*, puts her machinery to an unusual strain or exertion, and thereby rescues the tow from peril not caused by her own fault, she will be entitled to salvage remuneration, even if a price was fixed and agreed upon for her services when the contract was made. (*Lowndes on Average*, 153.) But such salvage remuneration will constitute a general average charge to be assessed on the vessel in tow and her cargo. (*Lowndes on Average*, 154.)

But it may be well doubted whether the rule which allows a tug compensation in the nature of salvage for extraordinary services rendered to her tow, would apply to a contract where she is to receive a proportion of her barge's freight.

See Rec. 35.

7. Appellant's counsel (Brief, 21) seem to claim, notwithstanding the facts certified and found by Justice Matthews in his opinion, that the barges in this case were in fact fitted to meet such an emergency as arose when the master of the propeller cast them off. As to this it is sufficient to say that no claim has ever been made that the loss of the barges was in any wise due to any fault on their part, or on the part of the persons on board of them. They went ashore almost immediately the towline was cut. They were then absolutely helpless.

8. Finally, it is urged (Brief, 36), "that the barges went ashore at the time and place and in the manner they would had the towline not been cut."

Possibly this is substantially true; but counsel concede that

the propeller would also have gone ashore with the barges, and that all would have been lost if the line had not been cut. The barges were not dragging the propeller ashore. The storm was driving them all ashore. The storm was the active agency against which the Donaldson struggled, and in order to save her from going ashore and being lost with the barges, her master sacrificed the latter, and the sacrifice resulted in the salvation of the propeller.

For the loss which resulted from the sacrifice, the propeller should contribute according to the principles of general average.

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